DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-1281
Title: National Labor Relations Board, Petitioner
v.
Noel Canning, et al.
Docketed: April 25, 2013
Linked with 13A209
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (12-1115)
Decision Date: January 25, 2013

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Apr 25 2013	Petition for a writ of certiorari filed. (Response due May 28, 2013)
May 13 2013	Brief of respondent International Brotherhood of Teamster Local 760 in support filed.
May 23 2013	Brief of respondent Noel Canning filed.
May 23 2013	Brief amicus curiae of Coalition for a Democratic Workplace filed.
May 28 2013	Brief amicus curiae of Constitutional Accountability Center filed.
May 28 2013	Brief amicus curiae of Professor Victor Williams filed.
May 28 2013	Brief amici curiae of Senate Republican Leader, Mitch McConnell, et al. filed.
Jun 4 2013	DISTRIBUTED for Conference of June 20, 2013.
Jun 6 2013	Reply of petitioner National Labor Relations Board filed. (Distributed)
Jun 24 2013	Petition GRANTED In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.
Jul 12 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 13, 2013.
Jul 12 2013	The time to file respondents' brief on the merits is extended to and including November 18, 2013.
Aug 26 2013	Application (13A209) to exceed the word limits of the parties briefs on the merits, submitted to The Chief Justice.
Aug 28 2013	Application (13A209) granted by The Chief Justice to exceed the word limits of the parties briefs on the merits. provided that each opening brief does not exceed 18,000 words, and that the reply brief does not exceed 7,200 words.
Sep 3 2013	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondent International Brotherhood of Teamsters Local 760.

Sep 12 2013	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for petitioner National Labor Relations Board.
Sep 13 2013	Brief of petitioner NLRB filed.
Sep 13 2013	Motion to dispense with printing the joint appendix filed by petitioner NLRB.
Sep 13 2013	Brief of respondent International Brotherhood of Teamsters Local 760 in support of the petitioner filed.
Sep 20 2013	Brief amicus curiae of The Brennan Center for Justice filed.
Sep 20 2013	Brief amicus curiae of Constitutional Accountability Center filed.
Sep 20 2013	Brief amicus curiae of Professor Victor Williams filed.
Oct 7 2013	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Nov 4 2013	SET FOR ARGUMENT ON Monday, January 13, 2014.
Nov 5 2013	CIRCULATED
Nov 12 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for Noel Canning.
Nov 18 2013	Brief of respondent Noel Canning filed. (Distributed)
Nov 19 2013	Record from the U.S.C.A. District of Columbia Circuit is electronic and located on PACER.
Nov 21 2013	Brief amicus curiae of Landmark Legal Foundation filed.
Nov 22 2013	Brief amicus curiae of Southeastern Legal Foundation filed. (Distributed)
Nov 25 2013	Administrative record received from the National Labor Relations Board. (1Box)
Nov 25 2013	Brief amici curiae of Senate Parliamentary Experts Robert B. Dove and Martin B. Gold filed. (Distributed)
Nov 25 2013	Brief amicus curiae of Speaker of the United States House of Representatives, John Boehner filed.
Nov 25 2013	Brief amici curiae of Coalition for a Democratic Workplace, et al. filed. (Distributed)
Nov 25 2013	Brief amicus curiae of Daycon Products Company, Inc. filed. (Distributed)
Nov 25 2013	Brief amici curiae of Citizens United, et al. filed. (Distributed)
Nov 25 2013	Brief amicus curiae of International Longshore and Warehouse Union filed. (Distributed)
Nov 25 2013	Brief amicus curiae of American Civil Rights Union filed. (Distributed)
Nov 25 2013	Brief amici curiae of Constitutional Law Scholars filed. (Distributed)
Nov 25 2013	Brief amicus curiae of Cato Institute filed. (Distributed)
Nov 25 2013	Brief amici curiae of Originalist Scholars filed. (Distributed)
Nov 25 2013	Brief amici curiae of Political Scientists and Historians filed. (Distributed)
Nov 25 2013	Brief amicus curiae of Council on Labor Law Equality filed. (Distributed)
Nov 25 2013	Brief amici curiae of Alabama, et al. filed. (Distributed)
Nov 25 2013	Brief amicus curiae of Independence Institute filed. (Distributed)
Nov 25 2013	Brief amici curiae of Judicial Watch, Inc., et al. filed. (Distributed)
Nov 25 2013	Brief amicus curiae of National Federation of Independent Business Small Business Legal Center filed. (Distributed)
Nov 25 2013	Brief amicus curiae of Mountain States Legal Foundation filed. (Distributed)
Nov 25 2013	Brief amici curiae of Brian W. Bulger, et al. filed. (Distributed)
Nov 25 2013	Brief amici curiae of Atlantic Legal Foundation, et al. filed. (Distributed)

Nov 25 2013	Brief amici curiae of State National Bank of Big Spring, et al. filed. (Distributed)
Nov 25 2013	Brief amici curiae of Senate Republican Leader Mitch McConnell and 44 Other Members of the United States Senate filed. (Distributed)
Nov 25 2013	Brief amicus curiae of Professor Tuan Samahon filed. (Distributed)
Nov 25 2013	Motion of Senate Republican Leader Mitch McConnell and 44 Other Members of the United States Senate for leave to participate in oral argument as amici curiae, for divided argument, and for additional argument time filed.
Nov 25 2013	Brief amici curiae of National Right to Work Legal Defense and Education Foundation, Inc., and Jeanette Geary. filed. (Distributed)
Nov 25 2013	Motion of Professor Victor Williams for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 25 2013	Response of Noel Canning, et al. to motion of Senate Republican Leader Mitch McConnell, et al. for leave to participate in oral argument as amici curiae, for divided argument, and for additional argument time filed.
Dec 9 2013	Motion of Senate Republican Leader Mitch McConnell, et al., for leave to participate in oral argument as amici curiae and for divided argument GRANTED, the time is to be divided as follows: 45 minutes for petitioner, 30 minutes for respondent Noel Canning, and 15 minutes for amici curiae Senate Republican Leader Mitch McConnell, et al.,
Dec 9 2013	Motion of Professor Victor Williams for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Dec 13 2013	Letter received from counsel of record for amicus for The Brennan Center for Justice. (Distributed).
Dec 18 2013	Reply of petitioner National Labor Relations Board filed. (Distributed)
Dec 18 2013	Reply of respondent International Brotherhood of Teamsters Local 760 in support of petitioner filed. (Distributed)
Jan 13 2014	Argued. For petitioner: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C. For respondents: Noel J. Francisco, Washington, D. C.; and Miguel A. Estrada, Washington, D. C. (for Senate Republican Leader Mitch McConnell, et al., as amici curiae).

PETITION FOR WRIT OF CERTIORARI

RECORD
AND
BRIEFS

No. 12-1281

SUPREME COURT, U.S.
FILED
APR 25 2013
OFFICE OF THE CLERK

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
SRI SRINIVASAN
Deputy Solicitor General
BETH S. BRINKMANN
Deputy Assistant Attorney General
CURTIS E. GANNON
Assistant to the Solicitor General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
MARK R. FREEMAN
SARANG V. DAMLE
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
JOSHUA P. WALDMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Deputy General Counsel
JOHN H. FERGUSON
MARGERY E. LIEBER
Associate General Counsels
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board
Washington, D.C. 20670

Library of Congress
Law Library

QUESTIONS PRESENTED

The Recess Appointments Clause of the Constitution provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, Cl. 3. The questions presented are as follows:

1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate.

2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the International Brotherhood of Teamsters Local 760 is also a party to the proceeding. It was an intervenor in the court of appeals.

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the National Labor Relations Board, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-55a) is reported at 705 F.3d 490. The decisions and orders of the National Labor Relations Board (App., *infra*, 56a-63a) and the administrative law judge (App., *infra*, 63a-90a) are not yet reported but are available at 2012 WL 402322.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Recess Appointments Clause of the Constitution (Art. II, § 2, Cl. 3) provides as follows:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Other pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. App., *infra*, 93a-99a.

STATEMENT

1. a. The National Labor Relations Board is an independent agency charged with the administration of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* The Board consists of five members, who are appointed by the President by and with the advice and consent of the Senate and who serve five-year terms. 29 U.S.C. 153(a). The Board is authorized to delegate any of its powers to a panel of three or more of its members. 29 U.S.C. 153(b).

Three members of the Board constitute a quorum. 29 U.S.C. 153(b). When the Board has delegated authority to a three-member panel, two members may act as a quorum of the panel, *ibid.*, except when the membership of the Board itself falls below three members, see *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2640-2645 (2010). Thus, when three positions on the Board become vacant, neither the Board nor any panel may exercise the Board's authority. Until the statutory quorum requirement is satisfied through the appointment of new members, the Board cannot adjudicate charges that employers or unions have engaged in unfair labor prac-

tices; nor can it issue cease-and-desist orders or provide affirmative remedies such as reinstatement and backpay to employees who have been injured by such practices. See generally 29 U.S.C. 160(a) and (c).

b. As of August 2010, the Board had a full complement of five members. On August 27, 2010, the term of one Board member expired, and the President submitted a nomination for that office to the Senate. See App., *infra*, 16a; 157 Cong. Rec. S69 (daily ed. Jan. 5, 2011). One year later, on August 27, 2011, another member's term expired, which left the Board with the minimum needed for a quorum under 29 U.S.C. 153(b) and *New Process Steel*. App., *infra*, 16a. The President submitted a nomination for that office to the Senate. 157 Cong. Rec. S8691 (daily ed. Dec. 15, 2011).

One of the three remaining members of the Board, Craig Becker, had been appointed during a recess of the Senate in 2010. Because the Recess Appointments Clause provides that the term of a recess appointee "shall expire at the End of [the Senate's] next Session," and Becker's recess appointment had been made during the second session of the 111th Congress, it was understood that his commission would expire at the end of the first session of the 112th Congress. App., *infra*, 15a.[1]

The first session of the 112th Congress ended at noon on January 3, 2012, when the second session began by operation of the Twentieth Amendment.[2] At that time,

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[1] The President had nominated Becker to a position on the Board, but in light of Senate inaction, the President withdrew that nomination and nominated someone else. 157 Cong. Rec. at S8691.

[2] In pertinent part, the Twentieth Amendment provides: "The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." Amend. XX, § 2. Thus, absent enact-

Member Becker's seat became vacant, and the Board ceased to have a quorum because the Senate had not acted on any of the President's nominations to the three vacant offices.

Approximately two weeks earlier, during the first session of the 112th Congress, the Senate adjourned pursuant to an order adopted by unanimous consent. App., *infra*, 91a-92a (reprinting order). That order provided that the Senate would reconvene "for pro forma sessions only, with no business conducted," on three dates between December 17 and the end of the session on January 3. *Id.* at 91a. Each "pro forma session," was to be followed immediately by another adjournment. *Ibid.* The Senate's order further provided that following the commencement of the second session of the 112th Congress (at noon on January 3), the Senate would again adjourn, reconvening only for pro forma sessions, "with no business conducted," on five specified dates between January 6 and January 20, with each pro forma session again being followed immediately by another adjournment. *Ibid.* The order provided that the Senate would resume business on January 23. *Id.* at 91a-92a. In another order entered the same day, the Senate specifically referred to its impending absence as a "recess." 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (authorizing committees to report on January 13 "notwithstanding the Senate's recess").

By virtue of the Senate's unanimous-consent order, the second session of the 112th Congress began with a

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ment of a law changing the date, a new enumerated annual session of Congress begins at noon on January 3. The prior enumerated session will end at the same time unless Congress has previously adjourned *sine die*, in which case the prior session will have ended on the date of that *sine die* adjournment. See p. 12, *infra*.

period of nearly three weeks, from January 3 to January 23, in which the Senate had provided that "no business [was to be] conducted," and during which no Senators were required to be in attendance other than the lone Senator who gaveled each pro forma session in and out. See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. Off. Legal Counsel __, at 2, 13 (Jan. 6, 2012), www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf. In view of the Senate's explicit cessation of business for that extended period, the President determined that the Senate was in recess. Accordingly, on January 4, 2012, the President invoked the Recess Appointments Clause and appointed three new members to fill the vacant seats on the Board.

2. This case involves a final order issued by the Board shortly after the January 2012 recess appointments. Respondent, an employer in the State of Washington, had a longstanding collective-bargaining relationship with a union representing respondent's production employees. App., *infra*, 4a. In 2010, respondent and the union agreed upon the terms of a new collective-bargaining agreement, but respondent then refused to execute the agreement or carry out its terms. *Id.* at 4a-6a. After the union filed a charge with the Board, a regional director, on behalf of the Acting General Counsel, issued a complaint alleging that respondent had committed an unfair labor practice by refusing to execute and implement the agreement. *Id.* at 63a-64a; see generally 29 U.S.C. 158(a)(1) and (5); *H.J. Heinz Co.* v. *NLRB*, 311 U.S. 514, 523-526 (1941) (refusal to sign written contract embodying agreed-upon terms of collective-bargaining agreement is unfair labor practice).

In September 2011, an administrative law judge found, following a hearing, that respondent had committed an unfair labor practice by refusing to execute an agreed-upon labor contract. App., *infra*, 63a-90a. The administrative law judge recommended that respondent be required to sign and implement the agreement and to make the employees whole for agreed-upon wage increases and benefits that respondent had wrongfully withheld. *Id.* at 86a.

On February 8, 2012, a three-member panel of the Board affirmed the administrative law judge's findings and conclusions and adopted his proposed order with minor modifications. App., *infra*, 56a-63a.

3. Respondent filed a petition for review of the Board's order in the United States Court of Appeals for the D.C. Circuit, and the Board filed a cross-petition for enforcement of the order. App., *infra*, 2a; see 29 U.S.C. 160(e) and (f).

Respondent not only contested the Board's order on the merits, but also contended, for the first time, that the Senate was not in recess when the President made the three recess appointments to the Board and that the Board therefore lacked a quorum when it issued its decision. App., *infra*, 2a-3a. Respondent claimed that the Senate's periodic "pro forma sessions" transformed what would otherwise be a 20-day recess in January 2012 into a series of three-day adjournments, each of which was individually too brief to constitute a recess. Resp. C.A. Br. 29-36. In response, the Board contended that, by adjourning on January 3 pursuant to the unanimous consent resolution that provided that the Senate would conduct no business until it reconvened on January 23, the Senate had entered into a recess, and the existence of periodic pro forma sessions during which no

business, including the giving of advice and consent on nominations, could be conducted did not divest the President of his constitutional authority to fill vacancies during that recess. Pet. C.A. Br. 23-71.

4. The court of appeals granted respondent's petition for review and vacated the Board's order. App., *infra*, 1a-55a. The court considered and rejected respondent's nonconstitutional challenges to the merits of the Board's order. *Id.* at 3a-10a. It also considered whether it had jurisdiction to address respondent's constitutional challenge, which had not been raised before the Board. *Id.* at 11a. The court found that, although "no governing precedent directly addresses this question," the "constitutional challenge to the Board's composition" fell within "the 'extraordinary circumstances' exception to the 29 U.S.C. § 160(e) [exhaustion] requirement." *Id.* at 11a, 13a.

Turning to the merits of the constitutional challenge, the court of appeals concluded that the President's appointments to the Board were not authorized by the Recess Appointments Clause. App., *infra*, 17a-52a. The court did not, however, rely on, or even discuss, respondent's contention that the Senate's pro forma sessions prevented its 20-day break from being a "recess" for purposes of the Recess Appointments Clause. Instead, the court based its decision on different constitutional grounds.

a. The court of appeals first held that the Recess Appointments Clause does not apply to all recesses of the Senate, but only to certain ones. More specifically, the court held that the President's authority under the Clause is restricted to *inter*-session recesses (*i.e.*, recesses that occur between the end of one enumerated session of Congress and the beginning of the next).

App., *infra*, 18a-35a. Thus, the court held that the President has no power to make recess appointments during *intra*-session recesses (*i.e.*, recesses that take place during the course of such a session).

The court of appeals inferred the limitation to inter-session recesses principally from the fact that the Recess Appointments Clause authorizes the President to fill vacancies during "the Recess" of the Senate. The court reasoned that the use of a definite article ("the," rather than "a") and a singular noun ("Recess," rather than "Recesses"), indicated that the Framers intended to confine the recess-appointment power to a specific recess rather than apply it to recesses as a class. App., *infra*, 19a. In the court's view, the specific recess that the Framers must have had in mind was the recess that occurs between one enumerated session of the Senate and the next. *Id.* at 20a-21a. The court recognized that Presidents had made many recess appointments based on a longstanding interpretation that the Clause applies to intra-session recesses as well as inter-session ones, but the court deemed it more significant that there had been no intra-session recess appointments before the Civil War and few until the Second World War. *Id.* at 23a. The court acknowledged that "intrasession recesses of significant length may have been far less common in those early days than today," but it concluded that the early dearth of intra-session recess appointments reflected "an assumed *absence* of the power to make such appointments." *Id.* at 24a (internal quotation marks and alterations omitted). The court also expressed concern that if Presidents could make recess appointments during intra-session recesses, they could evade the Senate's advice-and-consent function by waiting until an intra-session recess to make appointments. *Id.* at 26a.

b. Although the court of appeals' holding that the Recess Appointments Clause is limited to inter-session recesses was "sufficient to compel a decision vacating the Board's order," App., *infra*, 35a, the court proceeded to decide another question about the scope of the President's recess-appointment authority. The court held that, even during an inter-session recess, the President may not fill a vacancy unless that vacancy first arose during that same recess. *Id.* at 35a-52a.

The court of appeals reasoned that a vacancy "may happen during the Recess of the Senate" only when it arises during the inter-session recess. App., *infra*, 35a. The court rejected the Executive's longstanding interpretation that "happen" is better understood to mean "happen to exist" rather than "arise," asserting that such an interpretation would render superfluous the phrase "that may happen" and could enable the President to evade the Senate's role in the confirmation process. *Id.* at 35a, 36a, 37a. The court read the early history of recess appointments as supporting its view that only vacancies arising during a recess may be filled by recess appointments. *Id.* at 38a-41a. Although it acknowledged that the current statute relating to payment of recess appointees reflects Congress's acquiescence in the President's construction of the Clause, the court believed that earlier legislation enacted during the Civil War (and long since revised) reflected a repudiation of that interpretation. *Id.* at 42a-43a. The court suggested that the practical problems associated with its interpretation could be solved by legislation authorizing expanded use of "acting" officers. *Id.* at 44a-45a.

The court of appeals further held that even if a vacancy arises during a recess, and even if the recess is an inter-session one, the President still may not fill the

vacancy temporarily through a recess appointment unless he acts during the same recess in which the vacancy arose. App., *infra*, 51a. The court of appeals derived that additional limitation from the final portion of the Recess Appointments Clause, which provides that the commission of a recess appointee "shall expire at the End of [the Senate's] next Session." The court reasoned that the "next Session" can refer only to the session that follows the recess in which the vacancy arises, which, it believed, presupposes that the vacancy is being filled during that recess rather than any later one. *Ibid.*

c. Applying its construction of the Recess Appointments Clause to the President's January 2012 recess appointments to the Board, the court of appeals concluded that none of the vacancies had arisen during an inter-session recess and that none was filled during the recess in which the vacancy arose. App., *infra*, 34a-35a, 46a-47a. Finding that the Board lacked a valid quorum when it issued its final order in this case, the court vacated that order. *Id.* at 35a, 52a, 53a.

d. One member of the panel, Judge Griffith, concurred in part and concurred in the judgment. App., *infra*, 54a-55a. Judge Griffith agreed with the other members of the panel that the Recess Appointments Clause is confined to inter-session recesses. *Id.* at 54a. He declined, however, to decide whether the Clause is limited to vacancies that first arise during a recess. He noted that the Executive has maintained since the 1820s that the President may fill all vacancies that happen to exist during a recess, and he stated that a court should not repudiate such a longstanding interpretation of the Constitution by the Executive unless necessary to the disposition of the case. *Id.* at 54a-55a

5. Petitions for review and cross-applications for enforcement of many Board orders are currently pending before various courts of appeals, including the D.C. Circuit. See 29 U.S.C. 160(f) (permitting any person aggrieved by final order of the Board to petition for review in the circuit where the unfair labor practice is alleged to have occurred, where the aggrieved person resides or transacts business, or in the D.C. Circuit). After its decision in this case, the D.C. Circuit issued orders in numerous other NLRB cases pending in that court. Those orders held proceedings in abeyance pending further order. See, *e.g.*, *Alden Leeds, Inc.* v. *NLRB*, No. 11-1267 (order filed Feb. 19, 2013); *Sands Bethworks Gaming, LLC* v. *NLRB*, No. 12-1240 (order filed Jan. 25, 2013). Those cases remain in abeyance.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision would dramatically curtail the scope of the President's authority under the Recess Appointments Clause. Before that decision, Executive practice had long been predicated on the understanding that the Recess Appointments Clause authorizes the President to fill vacancies that exist during a recess of the Senate, regardless of whether the recess occurs between two enumerated sessions of Congress or during a session, and regardless of when the vacancies first arose. The decision below also conflicts with the decisions of three other federal courts of appeals and with the central objects of the Recess Appointments Clause. It would deem invalid hundreds of recess appointments made by Presidents since early in the Nation's history. It potentially calls into question every order issued by the National Labor Relations Board since January 4, 2012, and similar reasoning could threaten past and future decisions of other federal

agencies. Review of the court's constitutional holdings is warranted.

A. The President's Recess-Appointment Authority Is Not Confined To Inter-session Recesses

As the court of appeals acknowledged (App., *infra*, 30a), in holding that the President's recess-appointment authority cannot be exercised during an intra-session recess, the court created a square conflict with the Eleventh Circuit's decision in *Evans* v. *Stephens*, 387 F.3d 1220, 1224-1226 (2004) (en banc) (upholding appointment of Article III judge made during February 2004 recess), cert. denied, 544 U.S. 942 (2005). The decision below is inconsistent with the proper reading of the Recess Appointments Clause and with literally hundreds of previous recess appointments going back many decades.

1. Legislative bodies such as the Senate characteristically enter into a recess in one of two ways. When a legislature adjourns *sine die* (*i.e.*, without specifying a day for its return), it thereby ends its current session; the following recess, which lasts until the beginning of the next session, is commonly known as an *inter*-session one. App., *infra*, 47a-49a; Henry M. Robert, *Pocket Manual of Rules of Order for Deliberative Assemblies* § 42, at 109-110, § 63, at 169-170 (1885). When a legislature instead adjourns to a specified date, the business of the current session typically resumes when the legislature reconvenes, and the intervening recess is commonly known as an intra-session one.

The court of appeals' decision to exclude intra-session recesses from the Recess Appointments Clause is inconsistent with the text and purposes of the Clause itself, with the long-held understandings of the President and

the Senate, and with many decades of actual practice by the political Branches.

a. The constitutional text provides that the President may fill vacancies during "the Recess of the Senate." That text "does not differentiate expressly between inter- and intrasession recesses." *Evans*, 387 F.3d at 1224. As understood both at the time of the Framing and today, a "recess" is a "period of cessation from usual work." 13 *Oxford English Dictionary* 322-323 (2d ed. 1989) (*OED*) (citing seventeenth- and eighteenth-century sources); 2 Noah Webster, *An American Dictionary of the English Language* 51 (1828) (defining "recess" as a "[r]emission or suspension of business or procedure"); 2 Samuel Johnson, *A Dictionary of the English Language* s.v. "recess" (1755) (similar); *Evans*, 387 F.3d at 1224-1225. That definition is equally applicable to recesses between legislative sessions and recesses within those sessions.

In the legislative context, the Founding generation understood that the term "recess" included both inter- and intra-session recesses. That term was used to describe both kinds of breaks in British Parliamentary practice. See, *e.g.*, 13 *OED* 323 (quoting reference to House of Commons request about an impending "Recess of this Parliament" that was intra-session); 33 H.L. Jour. 464 (Nov. 26, 1772) (King's reference to a "Recess from Business" that was inter-session); Thomas Jefferson, *A Manual of Parliamentary Practice* § LI (2d ed. 1812) (describing a Parliamentary "recess by adjournment" as one occurring during an ongoing session). American legislative practice conformed to that understanding. For example, the Articles of Confederation empowered the Continental Congress to convene the Committee of the States "in *the recess* of Congress."

Articles of Confederation of 1781, Art. IX, Para. 5, and Art. X, Para. 1 (emphasis added). The one occasion on which that authority was exercised was an intra-session recess.[3] Similarly, the Pennsylvania and Vermont Constitutions each authorized the state Executive to issue a trade embargo "in the recess" of the legislature. See Pa. Const. of 1776, § 20; Vt. Const. of 1777, Ch. II, § XVIII. Those provisions were both invoked during intra-session legislative recesses.[4] And when the Constitutional Convention of 1787 adjourned on July 26 until August 6, some delegates, including the President of the Convention, referred to that intra-session period as "the recess."[5]

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[3] Annual sessions of the Continental Congress began on the first Monday in November, see Articles of Confederation of 1781, art. V, but the relevant recess occurred when Congress scheduled its adjournment to end earlier, on October 30, 1784. See 26 *J. Continental Cong. 1774-1789*, at 295-296 (Gaillard Hunt ed., 1928); 27 *id.* at 555-556.

[4] See, *e.g.*, 11 *Minutes of the Supreme Executive Council of Pennsylvania* 545 (Theo. Fenn & Co., 1852) (Aug. 1, 1778 embargo); 1 *J. of the H.R. of Pa.* 209-211 (John Dunlap ed., 1782) (adjourning from May 25, 1778 to September 9, 1778); 2 *Records of the Governor and Council of the State of Vermont* 164 (E.P. Walton ed., 1874) (May 26, 1781 embargo); 3 *State Papers of Vermont* 235 (P.H. Gobie Press, Inc., 1924) (adjourning from April 16, 1781 to June 13, 1781). Neither recess was preceded by a *sine die* adjournment or its equivalent. In both cases, the next annual legislative session did not commence until October. See Pa. Const. of 1776, § 9; Vt. Const. of 1777, Ch. II, § VIII.

[5] See 3 *The Records of the Federal Convention of 1787*, at 76 (Max Farrand ed., rev. ed. 1937) (letter from George Washington to John Jay; regretting Washington's inability to come to New York "during the recess" because his carriage was being repaired); *id.* at 191 (published version of Luther Martin's speech to the Maryland legislature; referring to matters he had wished to pursue "during the recess of the convention"); see also 2 *id.* at 128 (noting the adjournment).

b. Including intra-session recesses within the scope of the Recess Appointments Clause advances its central purposes. When the Senate is in session, the power to fill vacant offices is shared by the President and the Senate. The Recess Appointments Clause was meant to ensure that vacant offices may be filled, albeit temporarily, when the Senate is unavailable to offer its advice and consent to appointments to federal office, while freeing the Senate from the obligation of being "continually in session for the appointment of officers." *The Federalist No. 67*, at 455 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The Clause also enables the President to meet his continuous constitutional responsibility to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, since the President cannot exercise that authority "alone and unaided," but requires the "assistance of subordinates." *Myers* v. *United States*, 272 U.S. 52, 117 (1926); see 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 135 (Jonathan Elliot ed., 2d ed. 1836) (Archibald Maclaine's explanation that the power "to make temporary appointments * * * can be vested nowhere but in the executive, because he is perpetually acting for the public").

The Senate is no more available to provide its advice and consent during an intra-session recess, and the President is no less in need of officers to fulfill his constitutional obligation, than during an inter-session recess. Indeed, the need to fill vacancies may be even greater during intra-session recesses; in recent decades, the Senate's intra-session recesses have often lasted longer than its inter-session recesses. See S. Pub. 112-12, *Official Congressional Directory, 112th Congress* 529-538 (2011) (*Congressional Directory*), www.gpo.gov/

fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf (listing recesses during each session of Congress); see also *Evans*, 387 F.3d at 1226 & n.10 (noting that the Senate has taken "zero-day intersession recesses" as well as "intrasession recesses lasting months").

By excluding intra-session recesses from the scope of the President's recess-appointment authority, the court of appeals' interpretation creates periods of potentially significant duration in which there is no power to fill vacant offices, not even temporarily, no matter how long the recess or how great the need that an office be filled. The Recess Appointments Clause was adopted to eliminate, rather than permit, such lacunae.

c. The Senate and the President have long adopted a functional approach to determining when the Senate is in "recess" for purposes of the Recess Appointments Clause. In 1905, the Senate charged its Judiciary Committee with determining "[w]hat constitutes a 'recess of the Senate.'" S. Rep. No. 4389, 58th Cong., 3d Sess. 1 (1905). The committee concluded that the word "recess" is used "in its common and popular sense" and that it means

> the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress* * * * ; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.

Id. at 1, 2. The Senate still regards its 1905 Judiciary Committee report as an authoritative construction of the

term "recess."[6] In 1921, Attorney General Daugherty relied on that report and adopted the same considerations for determining whether a "recess" exists for purposes of the Clause. See 33 Op. Att'y Gen. 20, 24-25 (1921). An intra-session recess of sufficient length readily satisfies that functional approach. And, since the 1921 Attorney General opinion, executive and legislative officers have repeatedly affirmed the understanding that intra-session recess appointments are valid. See, *e.g.*, 41 Op. Att'y Gen. 463, 466-469 (1960); 20 Op. Off. Legal Counsel 124, 161 (1996); 13 Op. Off. Legal Counsel 271, 272-273 (1989); 6 Op. Off. Legal Counsel 585, 588 (1982); 3 Op. Off. Legal Counsel 314, 316 (1979); 28 Comp. Gen. 30, 34-37 (1948).

d. Actual practice reflects the foregoing considerations. Presidents have apparently made more than 500 recess appointments during intra-session recesses, including appointments of three cabinet secretaries, five court of appeals judges, ten district court judges, a Director of Central Intelligence, a Chairman of the Federal Reserve, numerous members of multi-member boards, and holders of a variety of other critical government posts. See Henry B. Hogue, Cong. Research Serv., *Memorandum re: Intrasession Recess Appointments* 3-4, 5-31 (Apr. 23, 2004) (identifying 177 intra-session recess appointments before 1981); see also Henry B. Hogue et al., Cong. Research Serv., *Memorandum re: The* Noel Canning *Decision and Recess Appointments Made From 1981-2013*, at 4-28 (Feb. 4, 2013), http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/Recess%20Appointments%201981-2013.pdf (identi-

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[6] See S. Doc. No. 28, 101st Cong., 2d Sess., *Riddick's Senate Procedure: Precedents and Practices* 947 & n.46 (1992).

fying 329 intra-session recess appointments since January 20, 1981).

As this Court has previously recognized, such "[t]raditional ways of conducting government . . . give meaning to the Constitution." *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) (internal quotation marks and citation omitted). "Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U.S. 655, 690 (1929); *ibid.* ("[A] practice of at least twenty years duration on the part of the executive department, acquiesced in by the legislative department, * * * is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.") (internal quotations marks and citation omitted).

2. The court of appeals' reasons for repudiating the political Branches' understanding of the Recess Appointments Clause's applicability during intra-session recesses are unpersuasive.

a. The court of appeals believed that the Clause's reference to "*the* Recess of the Senate" confines the Clause to inter-session recesses because it "suggests specificity." App., *infra*, 19a (emphasis added). But as the Eleventh Circuit explained, the word "the" can also be used to refer generically to a *class* of things (*e.g.*, "The pen is mightier than the sword") rather than a specific thing (*e.g.*, "The pen is on the table"). See *Evans*, 387 F.3d at 1224-1225 (citing dictionary usages).

Contrary to the D.C. Circuit's suggestion, App., *infra*, 32a, that usage is not a modern one that post-dates the Constitution. Indeed, other provisions of the Constitution itself use "the" when referring to something that

may happen on multiple occasions. For example, the Constitution directs the Senate to choose a temporary President of the Senate "in *the Absence* of the Vice President," Art. I, § 3, Cl. 5 (emphasis added)—a directive that necessarily applies to all Vice Presidential absences rather than any specific absence. Similarly, the Adjournment Clause provides that neither the House nor the Senate may adjourn for more than three days "during *the Session* of Congress" without the consent of the other body. Art. I, § 5, Cl. 4 (emphasis added). Because there are always two or more enumerated sessions in any Congress, the reference to "the Session" cannot refer to only a single one.

The fact that the Recess Appointments Clause refers to "the Recess" rather than "the Recesses," App., *infra*, 19a, 22a, 27a, 32a, is equally inapposite. The Constitution repeatedly uses a singular noun, in conjunction with the article "the" to refer to any instance in a class of repeating occurrences—as demonstrated by the references to "the Absence" and "the Session" in the provisions quoted in the preceding paragraph. Moreover, the Senate has always been constitutionally required to have at least two enumerated sessions during each Congress (see Art. I, § 4, Cl. 2; Amend. XX, § 2), and in the eighteenth and nineteenth centuries, the Senate regularly had three or four enumerated sessions. See *Congressional Directory* 522-526. Thus, with respect to the Recess Appointments Clause, there is no correlation between the reference to "the Recess" and the multiple inter-session recesses that have occurred within every Congress.

b. The court of appeals also suggested that the Framers would not have provided for recess appointments to expire at the end of the Senate's "next" session

unless they expected the recess-appointment power to be invoked only between enumerated congressional sessions. See App., *infra*, 20a-21a. But the choice of the next session as a uniform terminal date for recess appointments says nothing about whether a recess can occur within a session. As noted above, intra-session recesses were a recognized legislative practice at the time of the Framing. If the Framers had meant to exclude them from the reach of the President's power under the Recess Appointments Clause, they would hardly have expressed that intention in such an oblique manner. And there are practical reasons why the Framers would have decided that the terms of all recess appointees—including intra-session appointees—would last until the end of the next session. For example, because some intra-session recesses have extended almost to the end of the enumerated session (see, *e.g.*, *Congressional Directory* 528, 533, 536), an intra-session recess appointment may occur near the close of a session. In such a situation, the Senate may well lack the opportunity to consider a permanent nomination before the session ends. Thus, having the end of the *next* session mark the end of each recess appointment ensures that the Senate will have a full opportunity to consider a permanent nominee before the office becomes vacant again.

c. The court of appeals noted that that the Constitution sometimes uses the verb "adjourn" or the noun "adjournment" rather than "recess," and inferred that "recess" must have a more restrictive meaning than "adjournment." App., *infra*, 19a-20a. As an historical matter, however, "adjournment" was typically used to refer to the *act* of adjourning, while "recess" was used to refer to the resulting *period* of cessation from work, a

distinction that is reflected in the Constitution itself.[7] But even if the Constitution were thought to use "adjournment," like "recess," to refer to the period of a break in legislative work, as distinct from the act of adjourning, the Executive's position is entirely consistent with the possibility that "recess" is distinct from "adjournment." The Adjournment Clause makes clear that a legislative break of three days or less "during the Session of Congress" is still an "adjourn[ment]," Art. I, § 5, Cl. 4, but the Executive has long understood that such short intra-session breaks, which do not genuinely render the Senate unavailable to provide advice and consent, do not trigger the President's recess-appointment authority. See, *e.g.*, 33 Op. Att'y Gen. at 22; 16 Op. Off. Legal Counsel 15, 16 (1992).

d. The court of appeals made little effort to review the usage of "recess" during the period of the Framing, and the few historical materials that it did cite do not support its conclusions.[8] And rather than giving "great

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[7] Compare, *e.g.*, 1 *OED* 157 (using "adjournment" to refer to the "*act* of adjourning") (emphasis added), and U.S. Const. Art. I, § 7, Cl. 2 (Pocket Veto Clause) ("unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law"), with 13 *OED* 322 (using "recess" to refer to the "*period* of cessation from usual work") (emphasis added), and U.S. Const. Art. II, § 2, Cl. 3 ("[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate").

[8] The court of appeals cited a recess-appointment provision of the Revolutionary-era North Carolina constitution (N.C. Const. of 1776, Art. XX) and a later state-court decision, *Beard* v. *Cameron*, 7 N.C. (3 Mur.) 181 (1819), that supposedly "implie[d] that the provision was seen as differentiating between" the legislature's session and its recess. App., *infra*, 22a. But the language of the North Carolina provision differs significantly from that of the Recess Appointments Clause. Moreover, the suit in the cited state-court case was intended to allow the state supreme court to address whether the Governor

weight" (*The Pocket Veto Case*, 279 U.S. at 689) to the longstanding practice of Presidents making intra-session recess appointments, the court of appeals dismissed that body of practice on the ground that no intra-session recess appointment had been documented before 1867. App., *infra*, 23a-25a. But until the Civil War, there were no intra-session recesses longer than 14 days, and only a handful that exceeded three days. See *Congressional Directory* 522-525. Thus, the simplest explanation for the early rarity of intra-session recess appointments is that intra-session recesses of a length that might have furnished an occasion for a recess appointment were themselves relatively uncommon before the mid-twentieth century. See *id.* at 525-528.

e. Finally, the court of appeals speculated that Presidents could use intra-session recess appointments to evade the Senate's advice-and-consent role. App., *infra*, 26a. Actual practice disposes of that speculation. As explained above, the President's authority to make intra-session recess appointments has been accepted by both political Branches for nearly a century. Yet the kind of evasion posited by the court of appeals has never materialized. To the contrary, Presidents routinely seek Senate confirmation when filling vacant offices, and of course have a strong practical incentive to do so, because recess appointments are only temporary.

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could grant a temporary commission to fill a vacancy occasioned by the death of a judge that allegedly occurred while the General Assembly was in session. 7 N.C. (3 Mur.) at 181-182. The case was decided on an unrelated procedural ground. *Id.* at 184-186. It therefore did not answer that question. Nor did it imply anything about whether the state appointment power could be exercised during intra-session recesses.

The court of appeals' interpretation, however, would allow the Senate to disable the President from making recess appointments even when the Senate is unavailable to give its advice and consent, simply by replacing an adjournment *sine die* with a similarly long adjournment to a date certain at the end of the session. For example, the second session of the 82d Congress ended on July 7, 1952, when Congress adjourned *sine die*, and the President was able to make recess appointments from that date until January 3, 1953, when the next session of Congress began pursuant to the Twentieth Amendment. *Congressional Directory* 529. If the Senate had instead adjourned to a date immediately before the next session, such as January 2, the recess would have been nearly identical in length, but it would have been an intra-session recess, during which the President would have been powerless to make recess appointments under the D.C. Circuit's view, despite the Senate's absence of nearly six months. The Framers could hardly have intended such a result.

B. The President May Fill A Vacancy That Exists During A Recess Of The Senate, Even If The Vacancy Did Not First Arise During That Recess

The Recess Appointments Clause provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate." U.S. Const. Art. II, § 2, Cl. 3. For almost two centuries, the Executive has construed the phrase "that may happen" as referring to vacancies that exist during a recess of the Senate, and the President has made numerous appointments on that basis. Before the decision below, that construction had been approved by three courts of appeals, two of them sitting en banc. See *Evans*, 387 F.3d at 1226-1227 (11th Cir.) (en banc); *United States* v.

Woodley, 751 F.2d 1008, 1012-1013 (9th Cir. 1985) (en banc), cert. denied, 475 U.S. 1048 (1986); *United States* v. *Allocco*, 305 F.2d 704, 709-715 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963). The D.C. Circuit, however, rejected that construction, instead holding that a vacancy that first arises during a session of the Senate and remains unfilled when the Senate enters a recess may not be filled by the President during that recess, no matter how long the recess lasts—and even if the vacancy arose too late in the Senate's session to allow for a pre-adjournment nomination and confirmation. This Court should review and reverse that erroneous holding as well.

1. In 1823, Attorney General Wirt addressed this question in an opinion to President Monroe. 1 Op. Att'y Gen. 631. Wirt recognized that "happen" may be read to "mean 'happen to take place'" or that it "may mean, also, * * * 'happen to exist.'" *Id.* at 631-632. He concluded that the latter reading is most consonant with the "spirit, reason, and purpose" of the Constitution, which "was to keep these offices filled." *Id.* at 632, 634. He thus opined that "all vacancies which, from any casualty, happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled." *Id.* at 633. Subsequent Attorneys General (and Assistant Attorneys General) repeatedly endorsed Wirt's conclusion. See, *e.g.*, 41 Op. Att'y Gen. at 468; 13 Op. Off. Legal Counsel at 272; see also *Allocco*, 305 F.2d at 713 (listing opinions). Moreover, while there had been earlier debate about which construction was correct,[9]

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[9] In the 1790s, Attorney General Edmund Randolph did not adopt the view that Wirt later articulated, see App., *infra*, 39a, but President John Adams did, see 8 *The Works of John Adams* 632-633 (Charles Francis Adams ed., 1853) (letter from Adams stating he had

some Executive Branch practice before 1823 was consistent with Wirt's view, including two recess appointments made by President Washington[10] and one made by President Madison.[11] The Executive's long-held interpretation is entitled to "great weight" in "determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning." *The Pocket Veto Case*, 279 U.S. at 688-690.

Unlike the court of appeals' view, the Executive's construction also furthers the Recess Appointment Clause's basic object of ensuring a genuine opportunity

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"no doubt that it is my right and my duty" to make a recess appointment to an office that had first become vacant while the Senate was in session); *id.* at 647 (subsequent letter noting "a difference of opinion concerning the construction of the constitution" and, finding "no necessity for an immediate appointment," agreeing "to suspend it for the present, perhaps till the meeting of the Senate").

[10] In November 1793, Washington recess-appointed Robert Scot to be the first Engraver of the Mint, a position that was created by a statute enacted in April 1792. The vacancy arose when the statute was first passed, and was then filled during a later recess after at least one intervening session. 27 *The Papers of Thomas Jefferson* 191-192 (John Catanzariti ed., 1997); S. Exec. J., 3d Cong., 1st Sess., 142-143 (1793) (indicating that the office of Engraver was previously unfilled); Act of Apr. 2, 1792, ch. 16, 1 Stat. 246. In October 1796, Washington recess-appointed William Clarke to be the United States Attorney for Kentucky, even though the vacancy had gone unfilled for nearly four years. U.S. Dep't of State, *Calendar of the Miscellaneous Papers Received By The Department of State* 456 (1897); S. Exec. J., 4th Cong., 2d Sess. 217 (1796); Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky 1789-1816*, at 65-73 (1978).

[11] See Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 400-401 (2005). There is also some evidence to support appointments by President Jefferson that would be inconsistent with the court of appeals' interpretation. *Id.* at 391-400.

for vacancies to be filled, even if temporarily, at all times. If an unanticipated vacancy arises shortly before the Senate begins a recess, it may be impossible for the President to evaluate potential permanent replacements and for the Senate to act on a nomination while the Senate remains in session. Moreover, the relatively slow speed of long-distance communication in the eighteenth century meant that the President might not even have learned of such a vacancy until after the Senate's recess had begun. See 1 Op. Att'y Gen. at 632. If the Secretary of War died while inspecting military fortifications beyond the Appalachians, or an ambassador died while conducting negotiations abroad, the Framers could not have intended for those offices to remain vacant during a months-long recess merely because news of the death did not reach the seat of government until the Senate was already in recess. "If the [P]resident needs to make an appointment, and the Senate is not around, *when* the vacancy arose hardly matters; the point is that it must be filled now." Michael Herz, *Abandoning Recess Appointments?: A Comment on Harnett (and Others)*, 26 Cardozo L. Rev. 443, 445-446 (2005).

The established construction of the Clause also accords with the durational nature of a vacancy. Although the event that *causes* a vacancy, such as a death or resignation, will "happen" at a particular moment, the resulting vacancy itself will continue to "happen" until it is filled. Accord 2 Johnson, *Dictionary* s.v. "vacancy" (defining "vacancy" in 1755 as the "[s]tate of a post or employment when it is unsupplied"); see 12 Op. Att'y Gen. 32, 34-35 (1866). In common parlance, an event that persists over a period of time is said to "happen" throughout that period, not merely at the point it began. Thus, it is reasonable to say that World War II "hap-

pened" during the 1940s, even though the war began on September 1, 1939.

2. The court of appeals suggested that the Executive's longstanding construction renders the phrase "that may happen" superfluous. App., *infra*, 36a. But that is not so. Without that phrase, the Recess Appointments Clause could have been read to permit the President to fill up known *future* vacancies during a recess, such as when an official tenders a resignation weeks or months in advance of its effective date. Construing the text to refer to vacancies that "happen to exist" (1 Op. Att'y Gen. at 633) confines the President to filling vacancies already in existence during the recess.

Moreover, the court of appeals' holding creates serious textual difficulties of its own. The Clause gives the President the "Power to fill up all Vacancies that may happen during the Recess of the Senate." Art. II, § 2, Cl. 3. If the phrase "during the Recess of the Senate" were read to modify the term "happen" and to refer to the event that caused the vacancy, the phrase would limit only the *types* of vacancies that may be filled, and it would not limit the *time* when the President may exercise his "Power to fill up" those vacancies through granting commissions. As a result, the President would retain his power to fill a vacancy that arose during a recess even after the Senate returned from that recess—an interpretation that cannot possibly be correct. See 12 Op. Att'y Gen. at 38-39 (criticizing the "happen to arise" interpretation for this reason). By contrast, under the interpretation long since adopted by many Presidents, the phrase "during the Recess of the Senate" places a temporal limit on the President's "Power to fill up" a vacancy.

The court of appeals also dismissed evidence of Congress's acquiescence in the Executive's interpretation and practice on the ground that Congress had repudiated that interpretation in an 1863 pay statute. App., *infra*, 42a-43a. But far from rejecting the Executive's interpretation, the 1863 statute acknowledged it. See 16 Op. Att'y Gen. 522, 531 (1880). The statute merely postponed payment of salary to recess appointees who filled vacancies that first arose while the Senate was in session. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 646. And Congress later amended the statute to provide conditions in which even such appointees are to be paid. See Act of July 11, 1940, ch. 580, 54 Stat. 751.

At a practical level, the court of appeals recognized that its interpretation could leave offices vacant for potentially lengthy periods, but it suggested that Congress could solve that problem by providing more broadly than it has for the use of "acting" officials. App., *infra*, 44a-45a. But the very existence of the Recess Appointments Clause shows that the Framers did not believe it would be sufficient to have the duties of vacant offices performed by subordinate officials in an "acting" capacity. Moreover, some offices, such as Article III judgeships, cannot be performed on an acting basis at all, and it may be unworkable or impractical to rely on acting officials to fill other positions, such as Cabinet-level positions or positions on multi-member boards designed to be politically balanced, for significant periods of time.

3. Having held that the President may fill only vacancies that *first arise* during an *inter*-session recess, the court of appeals further restricted even that drastically narrowed authority by holding that the President may fill such a vacancy only during the same recess in

which it first arises. App., *infra*, 51a. In doing so, the court looked to the portion of the Recess Appointments Clause that provides for the temporary terms of recess appointees to expire "at the End of [the Senate's] next Session." The court construed "next Session" to mean the next session after the recess in which the vacancy arose, which would effectively preclude filling the vacancy through an appointment in a subsequent recess. *Ibid.*

The phrase "next Session," however, refers to the next session after the President fills a vacancy by granting a commission. That reading is both long accepted and grammatically straightforward. The constitutional text ties the expiration of the appointments to the act of "granting Commissions," not to the "happen[ing]" of the vacancy. And if "happen" means "happen to exist," then "next Session" must refer to the "next Session" after the filling of the vacancy, because the vacancy itself may "happen to exist" during more than one session. That conclusion is especially appropriate because a variety of reasons—including the press of other urgent executive and legislative business—may prevent the President from making, or the Senate from acting upon, a nomination by the end of the "next Session" after a vacancy arises. There was accordingly good reason to tie the duration of a recess appointment to the time of appointment, rather than the time the vacancy first arises. Nothing in the text of the Clause supports the court of appeals' contrary interpretation.

C. The Court Of Appeals' Decision Would Have Serious And Far-Reaching Consequences

The court of appeals' decision would deny the President the authority to fill vacant offices during intra-session recesses—which account for much of the time that the modern Senate is not in session—and would

further preclude him from filling many vacancies even during inter-session recesses. That decision repudiates understandings of the Recess Appointments Clause that have been maintained and relied on by the Executive for most of the Nation's history. The limitations imposed by the court of appeals would render many of the recess appointments since the Second World War unconstitutional.

The decision also threatens a significant disruption of the federal government's operations—including, most immediately, those of the National Labor Relations Board. The decision potentially calls into question every final decision of the Board since January 4, 2012. And, because many of the Board's members have been recess-appointed during the past decade, it could also place earlier orders in jeopardy. The National Labor Relations Act places no time limit on petitions for review and allows such petitions to be brought in either a regional circuit *or* the D.C. Circuit. See 29 U.S.C. 160(f). Thus, the potential effects of the decision below are limited by neither time nor geography.

Moreover, those effects can also be expected to extend to a wider range of federal agencies and offices, because venue lies in the District of Columbia in virtually all civil actions seeking review of federal agency actions. See, *e.g.*, 28 U.S.C. 1391(e)(1) (Supp. V 2011), 28 U.S.C. 2343. If the decision below is allowed to stand, almost any federal officer who received a recess appointment during an intra-session recess, or who was appointed to fill a vacancy that did not first arise during the recess in which the appointment was made, could have his actions challenged in the D.C. Circuit on the ground that his appointment was unconstitutional and his official actions were *ultra vires*.

Review by this Court is warranted to resolve the circuit conflict created by the decision below, to remove the resulting constitutional cloud over the acts of past and present recess appointees, and to restore the President's capacity to fill vacant offices temporarily when the Senate is unavailable to give its advice and consent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
SRI SRINIVASAN
Deputy Solicitor General
BETH S. BRINKMANN
Deputy Assistant Attorney General
CURTIS E. GANNON
Assistant to the Solicitor General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
MARK R. FREEMAN
SARANG V. DAMLE
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
JOSHUA P. WALDMAN
Attorneys

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Deputy General Counsel
JOHN H. FERGUSON
MARGERY E. LIEBER
Associate General Counsels
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

APRIL 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1115
Consolidated with 12-1153

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760, INTERVENOR

Argued: Dec. 5, 2012
Decided: Jan. 25, 2013

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

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Before: SENTELLE, *Chief Judge*, HENDERSON and GRIFFITH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* SENTELLE.

Concurring opinion filed by *Circuit Judge* GRIFFITH.

SENTELLE, *Chief Judge*: Noel Canning petitions for review of a National Labor Relations Board ("NLRB" or "the Board") decision finding that Noel Canning violated section 8(a)(1) and (5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), (5), by refusing to reduce to writing and execute a collective bargaining agreement reached with Teamsters Local 760 ("the Union"). *See Noel Canning, A Division of the Noel Corp.*, 358 N.L.R.B. No. 4, 2012 WL 402322 (Feb. 8, 2012) ("Board Decision"). NLRB cross-petitions for enforcement of its order. On the merits of the NLRB decision, petitioner argues that the Board did not properly follow applicable contract law in determining that an agreement had been reached and that therefore, the finding of unfair labor practice is erroneous. We determine that the Board issuing the findings and order could not lawfully act, as it did not have a quorum, for reasons set forth more fully below.

I. INTRODUCTION

At its inception, this appears to be a routine review of a decision of the National Labor Relations Board over which we have jurisdiction under 29 U.S.C. § 160(e) and (f), providing that petitions for review of Board orders may be filed in this court. The Board issued its order on February 8, 2012. On February 24, 2012, the company filed a petition for review in this court, and the Board filed its cross-application for enforcement on March 20, 2012. While the posture of the petition is routine, as it developed, our review is not. In its brief before us, Noel Canning (along with a movant for status as intervenor whose motion we will

dismiss for reasons set forth hereinafter) questions the authority of the Board to issue the order on two constitutional grounds. First, petitioner asserts that the Board lacked authority to act for want of a quorum, as three members of the five-member Board were never validly appointed because they took office under putative recess appointments which were made when the Senate was not in recess. Second, it asserts that the vacancies these three members purportedly filled did not "happen during the Recess of the Senate," as required for recess appointments by the Constitution. U.S. Const. art. II, § 2, cl. 3. Because the Board must have a quorum in order to lawfully take action, if petitioner is correct in either of these assertions, then the order under review is void *ab initio*. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

Before we can even consider the constitutional issues, however, we must first rule on statutory objections to the Board's order raised by Noel Canning. It is a well-settled principle of constitutional adjudication that courts "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see also Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *United States v. Waksberg*, 112 F.3d 1225, 1227 (D.C. Cir. 1997). We must therefore decide whether Noel Canning is entitled to relief on the basis of its nonconstitutional arguments before addressing the constitutional question. Noel Canning raises two statutory arguments. First,

it contends that the ALJ's conclusion that the parties in fact reached an agreement at their final negotiation session is not supported by substantial evidence. Second, it argues that even if such an agreement were reached, it is unenforceable under Washington law. We address each argument in turn.

A. The Sufficiency of the Evidence

Refusal to execute a written collective bargaining agreement incorporating terms agreed upon during negotiations is an unfair labor practice under section 8(a)(1) and (5) of the NLRA. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 525-26 (1941). Whether the parties reached an agreement during negotiations is a question of fact. *See NLRB v. Int'l Bhd. of Elec. Workers*, 748 F.2d 348, 350 (8th Cir. 1984); *NLRB v. Roll & Hold Div. Area Transp. Co.*, 957 F.2d 328, 331 (7th Cir. 1992). We therefore must affirm the Board's conclusion that an agreement was in fact reached if that conclusion is supported by substantial evidence. 29 U.S.C. § 160(e).

Noel Canning and the Union had in the past enjoyed a long collective bargaining relationship, but the parties were unable to reach a new agreement before their most recent one expired in April 2010. Negotiations began in June 2010. By the time the parties met for their final negotiation session in December 2010, all issues save wages and pensions had been resolved. According to notes taken by Union negotiators at the parties' final negotiating session, the parties agreed to present two alternative contract proposals to the Union membership: one preferred by Noel Canning man-

agement and the other by the Union. Each proposal included wage and pension increases but allocated the increases differently. The notes reveal that the Union proposal put no limit on the membership's right to decide how much of the $0.40 per hour pay increase to allocate to its pension fund. According to the notes and Union witnesses, the parties agreed that both proposals would be submitted to the Union membership for a ratification vote and that the parties would be bound by the outcome of that vote. Union negotiators testified that after the parties read aloud the terms of the two proposals, Noel Canning's president stood and said "let's do it." Deferred Appendix 78. A Noel Canning officer agreed to email the terms to the Union the next day. After the company agreed to allow the Union to use a company conference room to hold the vote, the negotiators shook hands and departed.

The next day, Noel Canning management emailed the Union the wage and pension terms of the two proposals. According to the email, however, the Union proposal capped at $0.10 the amount of the $0.40 pay increase that the membership could devote to its pension fund. The email thus conflicted with the Union negotiators' notes, which left the allocation question entirely to the membership. When the chief Union negotiator, Bob Koerner, called Noel Canning's president to discuss the discrepancy, the president responded that since the agreement was not in writing, it was not binding. The vote took place anyway, and the membership ratified the Union's preferred proposal, which allocated the entire pay increase to the pension

fund. Noel Canning posted a letter informing the Union that the company considered the ratification vote to be a counteroffer, which the company rejected, and declared the parties to be at an impasse. Noel Canning subsequently refused to execute a written agreement embodying the terms ratified by the Union.

The Union filed an unfair labor practice charge premised on Noel Canning's refusal to execute the written agreement. After a two-day hearing, the ALJ determined that the parties had in fact achieved *consensus ad idem* as to the terms of the Union's preferred proposal and that Noel Canning's refusal to execute the written agreement constituted an unfair labor practice under section 8(a)(1) and (5) of the NLRA. The ALJ ordered Noel Canning to sign the collective bargaining agreement. Noel Canning timely filed exceptions to the ALJ's decision, and the Board affirmed.

Unsurprisingly, the parties' testimony at the ALJ hearing conflicted over whether the parties in fact agreed to the terms of the Union proposal. The ALJ's decision thus rested almost entirely on his determination of the witnesses' credibility. Assessing the conflicting testimony, the ALJ determined that because the Union witnesses' testimony was corroborated by contemporaneous notes taken during the December 2010 negotiation session, the Union's witnesses were credible. In contrast, he determined that Noel Canning's witnesses were not credible because they neither "produced notes of the meeting [n]or explained why no notes were available" and because their

testimony was "abbreviated, conclusionary, nonspecific, and unconvincing." Board Decision at 7 (ALJ Op.).

We are loathe to overturn the credibility determinations of an ALJ unless they are "hopelessly incredible, self-contradictory, or patently insupportable." *Stephens Media, LLC v. NLRB*, 677 F.3d 1241, 1250 (D.C. Cir. 2012) (internal quotation marks omitted). Here, the ALJ chose the corroborated testimony of Union negotiators over the unsupported testimony of Noel Canning employees. And given undisputed testimony that at least one Noel Canning representative took notes of the meeting, the ALJ weighed Noel Canning's failure to corroborate its testimony against it. As we noted, the ALJ also found Noel Canning's witnesses' testimony to be unspecific and abbreviated. In *Monmouth Care Center v. NLRB*, we found no reason to set aside a credibility determination where "the ALJ credited the testimony of the union's negotiator over that of the petitioners' representatives . . . based on a combination of testimonial demeanor and a lack of specificity and internal corroboration for the petitioners' claims." 672 F.3d 1085, 1091 (D.C. Cir. 2012). The ALJ made a nearly identical determination here, and we discern no reason to disturb it.

Noel Canning nevertheless claims that Koerner's testimony is plagued by inconsistencies. But the inconsistencies and contradictions it identifies are either irrelevant or merely the result of the competing testimony of the two parties' witnesses. There is nothing in the Union testimony—corroborated by contempo-

raneous notes—that hints at hopeless incredibility or self-contradiction.

Noel Canning thus relies on what it alleges to be an inconsistency between Koerner's testimony and his affidavit. The affidavit, which is not in the record, apparently contained the following sentence, referring to the parties' tentative agreement as "TA": "I was voting the contract on Wednesday and that I would vote what we TA'd during the December 8th meeting —noting different than TA'd." Deferred Appendix 74. When asked at the ALJ hearing if he saw any errors in his affidavit, Koerner claimed he saw none but struggled to explain what the language meant. Noel Canning contends that the affidavit is an explicit admission that Koerner presented an offer to the Union that was materially different from the one agreed upon by the parties and therefore contradicts his testimony. The ALJ rejected Noel Canning's interpretation, concluding that the sentence suffered from a typographical error—"noting" should have been "nothing"—and that the error accounted for the witness's inability to explain the affidavit's meaning. Board Decision at 5 n.8 (ALJ Op.).

We conceive of no reason to disagree. As written, the language of the affidavit is confusing and becomes intelligible only if the typographical error pointed out by the ALJ is corrected. Moreover, the ALJ specifically determined that the witness was confused by the affidavit, not that he was trying to conceal deception, as Noel Canning contends. We are "ill-positioned to second-guess" that determination. *W.C. McQuaide,*

Inc. v. NLRB, 133 F.3d 47, 53 (D.C. Cir. 1998). And even assuming that Noel Canning's reading is correct, it does not support the company's chief argument before the Board—that the parties failed to reach *any* agreement at the December 2010 negotiation session —because even the affidavit evinces that the parties reached some sort of agreement. Given the deference we owe to the ALJ's credibility determinations, the consistency between the negotiators' notes and the deal the membership approved, and the lack of any evidence otherwise suggesting that Koerner was an incredible witness, this case is not the rare one in which we will overturn an ALJ's credibility determination. The Board's decision was therefore supported by substantial evidence.

B. The Enforceability of the Contract

We also agree with the Board that we lack jurisdiction to consider Noel Canning's choice of law argument. Section 10(e) of the NLRA forbids us from exercising jurisdiction to hear any "objection that has not been urged before the Board." 29 U.S.C. § 160(e); *see also Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1329-30 (D.C. Cir. 2012). The ALJ specifically rejected Noel Canning's argument that he should apply Washington state law to decide whether the contract could be enforced. In its exceptions to the Board, however, Noel Canning did not mention Washington law. Although Noel Canning contended that the ALJ incorrectly determined that the parties had in fact reached *consensus ad idem* during negotiations, it

nowhere argued that the ALJ made an incorrect choice of law to govern the contracts issue.

"While we have not required that the ground for the exception be stated explicitly in the written exceptions filed with the Board, we have required, at a minimum, that the ground for the exception be evident by the context in which the exception is raised." *Trump Plaza Assocs. v. NLRB*, 679 F.3d 822, 829 (D.C. Cir. 2012) (internal quotation marks omitted). Nothing in Noel Canning's exceptions even hints that it objected to the application of federal law. On the contrary, it conceded to the Board that "[i]t is not in dispute that an employer violates [the NLRA] by refusing to execute a Collective Bargaining Agreement incorporating all of the terms agreed upon by the parties during negotiations." Deferred Appendix 100. We therefore lack jurisdiction to consider Noel Canning's state-law argument because its objections were not "adequate to put the Board on notice that the issue might be pursued on appeal." *Consol. Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981). Having determined that Noel Canning does not prevail on its statutory challenges, consideration of the constitutional question is unavoidable, and we proceed to its resolution.

Because we agree that petitioner is correct in both of its constitutional arguments, we grant the petition of Noel Canning for review and deny the Board's petition for enforcement.

II. JURISDICTION

Although no party has questioned our jurisdiction to decide the constitutional issues raised in this petition, federal courts, being courts of limited jurisdiction, must assure themselves of jurisdiction over any controversy they hear, regardless of the parties' failure to assert any jurisdictional question. *See Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984). We note at the outset that there is a serious argument to be made against our having jurisdiction over the constitutional issues. Section 10(e) of the NLRA, governing judicial review of the Board's judgments and petitions for enforcement, provides: "No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). The record reflects no attempt by petitioner to raise the threshold issues related to the recess appointments before the Board. Our first question, then, is whether this failure to urge the objection before the Board comes within the exception for "extraordinary circumstances." We hold that it does.

We acknowledge that no governing precedent directly addresses this question. Nonetheless, there is instructive precedent from other circumstances and other similar administrative proceedings under other statutes. First, we note that in another administrative agency review, *Railroad Yardmasters of America v. Harris*, we held that a challenge to the authority of

the National Mediation Board on the basis that it had no quorum "present[ed] a question of power or jurisdiction and is open to the appellee even if not initially asserted before the Board." 721 F.2d 1332, 1338 (D.C. Cir. 1983). In *Railroad Yardmasters*, we relied on the Supreme Court's decision in *United States v. L. A. Tucker Truck Lines, Inc.* *Id.* at 1337-38 (discussing *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952)). In *L. A. Tucker Truck Lines*, the Court considered a challenge to the appointment of an examiner in an Interstate Commerce Commission proceeding. 344 U.S. at 35. Therein the Court stated in dicta that this was not a defect "which deprives the Commission of power or jurisdiction, so that even in the absence of timely objection its order should be set aside as a nullity." *Id.* at 38. In *L. A. Tucker Truck Lines*, the challenge was not to the Commission's power to act, but only its examiner's. We held in *Railroad Yardmasters* that the *L. A. Tucker Truck Lines* rejection of the challenge did not govern because in the case before us, "the appellee contend[ed] that the National Mediation Board had no power to act at all at a time when there were two vacancies on the Board." 721 F.2d at 1338. Because that challenge "present[ed] a question of power or jurisdiction . . . [it was] open to the appellee even if not initially asserted before the Board." *Id.*

The reasoning of *Yardmasters* is applicable here. As in *Yardmasters*, the objections before us concerning lack of a quorum raise questions that go to the very power of the Board to act and implicate fundamental separation of powers concerns. We hold that they are

governed by the "extraordinary circumstances" exception to the 29 U.S.C. § 160(e) requirement and therefore are properly before us for review.

Admittedly, *Yardmasters* did not implicate our jurisdiction nor have we ever applied it to a jurisdictional exhaustion statute. But in *Natural Resources Defense Council v. Thomas*, we considered whether to apply *Yardmasters* to section 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B), a jurisdictional administrative exhaustion requirement. 805 F.2d 410, 428 & n.29 (D.C. Cir. 1986). Although we ultimately declined to apply it, we did so because the facts of the case did not involve the *Yardmasters* exception, not because *Yardmasters* does not apply to a jurisdictional exhaustion statute. *See id.* Confronted for the first time with facts that do trigger the *Yardmasters* exception in the context of a jurisdictional exhaustion statute, we hold that we may exercise jurisdiction under section 10(e) because a constitutional challenge to the Board's composition creates "extraordinary circumstances" excusing failure to raise it below.

In various circumstances, both this court and the Supreme Court have considered objections to the authority of the decisionmaker whose decision is under review even when those objections were not raised below. For example, the Supreme Court has stated, admittedly in dicta, that "if the Board has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce," a reviewing court cannot enter an order of enforcement, such as the Board seeks in this case. *NLRB v. Cheney Cali-*

fornia Lumber Co., 327 U.S. 385, 388 (1946). It is true that petitioner's argument before us does not raise the Board's "travel[ing] outside the orbit of its authority" in precisely the same way as in *Cheney*. In that case, the Supreme Court addressed arguments concerning the scope of the Board's authority. Here, however, there is "no order to enforce" because there was no lawfully constituted Board. The *Cheney* order was "outside the orbit of authority" by reason of its scope. The present order is outside the orbit of the authority of the Board because the Board had no authority to issue any order. It had no quorum. *See generally New Process Steel*, 130 S. Ct. 2635. This, we hold, constitutes an extraordinary circumstance within the meaning of the NLRA.

We further find instructive our decision in *Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009). In that case, we considered an objection to the Board's authority to subject a religious institution to the NLRA's collective bargaining requirements. *Id.* at 571. In agreeing with the petitioner in *Carroll College* that the Board had erred, we stated, "[t]he Board thus had no jurisdiction to order the school to bargain with the union, and we have authority to invalidate the Board's order even though the college did not raise its jurisdictional challenge below." *Id.* at 574. Although for different reasons, the petitioner here, just as in *Carroll College*, argues that the Board was without authority to enter the order under review. Just as in *Carroll College*, we hold that where the Board "had no jurisdiction" to enter the order, "we have authority to invalidate the Board's order even though

the [petitioner] did not raise its jurisdictional challenge below." *Id.*

III. THE UNDERLYING PROCEEDINGS

Petitioner is a bottler and distributor of Pepsi-Cola products and is an employer within the terms of the NLRA. As discussed, an NLRB administrative law judge concluded that Noel Canning had violated the NLRA. Board Decision at 8 (ALJ Op.). After Noel Canning filed exceptions to the ALJ's findings, a three-member panel of the Board, composed of Members Hayes, Flynn, and Block, affirmed those findings in a decision dated February 8, 2012. *Id.* at 1 (Board Op.).

On that date, the Board purportedly had five members. Two members, Chairman Mark G. Pearce and Brian Hayes, had been confirmed by the Senate on June 22, 2010. It is undisputed that they remained validly appointed Board members on February 8, 2012. *See* 156 Cong. Rec. S5,281 (daily ed. June 22, 2010).

The other three members were all appointed by the President on January 4, 2012, purportedly pursuant to the Recess Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 3. *See Ctr. for Soc. Change, Inc.*, 358 N.L.R.B. No. 24, slip op. at 1, 2012 WL 1064641 (2012).

The first of these three members, Sharon Block, filled a seat that became vacant on January 3, 2012, when Board member Craig Becker's recess appointment expired. *See* 158 Cong. Rec. S582-83 (daily ed. Feb. 13, 2012); Part IV.B, *infra*.

The second of the three members, Terence F. Flynn, filled a seat that became vacant on August 27, 2010, when Peter Schaumber's term expired. *See* 158 Cong. Rec. S582-83; 152 Cong. Rec. 17,077 (2006). The third, Richard F. Griffin, filled a seat that became vacant on August 27, 2011, when Wilma B. Liebman's term expired. *See* 158 Cong. Rec. S582-83; 152 Cong. Rec. 17,077.

At the time of the President's purported recess appointments of the three Board members, the Senate was operating pursuant to a unanimous consent agreement, which provided that the Senate would meet in *pro forma* sessions every three business days from December 20, 2011, through January 23, 2012. 157 Cong. Rec. S8,783-84 (daily ed. Dec. 17, 2011). The agreement stated that "no business [would be] conducted" during those sessions. *Id.* at S8,783. During the December 23 *pro forma* session, the Senate overrode its prior agreement by unanimous consent and passed a temporary extension to the payroll tax. *Id.* at S8,789 (daily ed. Dec. 23, 2011). During the January 3 *pro forma* session, the Senate acted to convene the second session of the 112th Congress and to fulfill its constitutional duty to meet on January 3. 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012); *see* U.S. Const. amend. XX, § 2 ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.").

Noel Canning asserts that the Board did not have a quorum for the conduct of business on the operative

date, February 8, 2012. Citing *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), which holds that the Board cannot act without a quorum of three members, Noel Canning asserts that the Board lacked a quorum on that date. Noel Canning argues that the purported appointments of the last three members of the Board were invalid under the Recess Appointments Clause of the Constitution, Article II, Section 2, Clause 3. Because we agree that the appointments were constitutionally invalid and the Board therefore lacked a quorum, we grant the petition for review and vacate the Board's order.

IV. ANALYSIS

It is undisputed that the Board must have a quorum of three in order to take action. It is further undisputed that a quorum of three did not exist on the date of the order under review unless the three disputed members (or at least one of them) were validly appointed. It is further agreed that the members of the Board are "Officers of the United States" within the meaning of the Appointments Clause of the Constitution, which provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art. II, § 2, cl. 2. Finally, it is undisputed that the purported appointments of the three members were not

made "by and with the Advice and Consent of the Senate."

This does not, however, end the dispute. The Board contends that despite the failure of the President to comply with Article II, Section 2, Clause 2, he nonetheless validly made the appointments under a provision sometimes referred to as the "Recess Appointments Clause," which provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Id.* art. II, § 2, cl. 3. Noel Canning contends that the putative recess appointments are invalid and the Recess Appointments Clause is inapplicable because the Senate was not in the recess at the time of the putative appointments and the vacancies did not happen during the recess of the Senate. We consider those issues in turn.

A. The Meaning of "the Recess"

Noel Canning contends that the term "the Recess" in the Recess Appointments Clause refers to the intersession recess of the Senate, that is to say, the period between sessions of the Senate when the Senate is by definition not in session and therefore unavailable to receive and act upon nominations from the President. The Board's position is much less clear. It argues that the alternative appointment procedure created by that Clause is available during intrasession "recesses," or breaks in the Senate's business when it is otherwise in a continuing session. The Board never states how short a break is too short, under its theory, to serve as

a "recess" for purposes of the Recess Appointments Clause. This merely reflects the Board's larger problem: it fails to differentiate between "recesses" and the actual constitutional language, "the Recess."

It is this difference between the word choice "recess" and "the Recess" that first draws our attention. When interpreting a constitutional provision, we must look to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008). Then, as now, the word "the" was and is a definite article. *See* 2 Samuel Johnson, A Dictionary of the English Language 2041 (1755) (defining "the" as an "article noting a *particular* thing" (emphasis added)). Unlike "a" or "an," that definite article suggests specificity. As a matter of cold, unadorned logic, it makes no sense to adopt the Board's proposition that when the Framers said "the Recess," what they really meant was "a recess." This is not an insignificant distinction. In the end it makes all the difference.

Six times the Constitution uses some form of the verb "adjourn" or the noun "adjournment" to refer to breaks in the proceedings of one or both Houses of Congress. Twice, it uses the term "the Recess": once in the Recess Appointments Clause and once in the Senate Vacancies Clause, U.S. Const. art. I, § 3, cl. 2. Not only did the Framers use a different word, but none of the "adjournment" usages is preceded by the definite article. All this points to the inescapable conclusion that the Framers intended something spe-

cific by the term "the Recess," and that it was something different than a generic break in proceedings.

The structure of the Clause is to the same effect. The Clause sets a time limit on recess appointments by providing that those commissions shall expire "at the End of their [the Senate's] next Session." Again, the Framers have created a dichotomy. The appointment may be made in "the Recess," but it ends at the end of the next "Session." The natural interpretation of the Clause is that the Constitution is noting a difference between "the Recess" and the "Session." Either the Senate is in session, or it is in the recess. If it has broken for three days within an ongoing session, it is not in "the Recess."

It is universally accepted that "Session" here refers to the usually two or sometimes three sessions per Congress. Therefore, "the Recess" should be taken to mean only times when the Senate is not in one of those sessions. *Cf. Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) (interpreting terms "by reference to associated words"). Confirming this reciprocal meaning, the First Congress passed a compensation bill that provided the Senate's engrossing clerk "two dollars per day during the session, with the like compensation to such clerk while he shall be necessarily employed in the recess." Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70, 71.

Not only logic and language, but also constitutional history supports the interpretation advanced by Noel Canning, not that of the Board. When the Federalist Papers spoke of recess appointments, they referred to

those commissions as expiring "at the end of the ensuing session." The Federalist No. 67, at 408 (Clinton Rossiter ed., 2003). For there to be an "ensuing session," it seems likely to the point of near certainty that recess appointments were being made at a time when the Senate was not in session—that is, when it was in "the Recess." Thus, background documents to the Constitution, in addition to the language itself, suggest that "the Recess" refers to the period between sessions that would end with the ensuing session of the Senate.

Further, the Supreme Court has used analogous state constitutional provisions to inform its interpretation of the Constitution. *See Heller*, 128 S. Ct. at 2802. For example, in *Collins v. Youngblood*, the Court considered several early state constitutions in discerning "the original understanding of the *Ex Post Facto* Clause" because "they appear to have been a basis for the Framers' understanding of the provision." 497 U.S. 37, 43 (1990). The North Carolina Constitution, which contains the state constitutional provision most similar to the Recess Appointments Clause and thus likely served as the Clause's model, *see* Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 Colum. L. Rev. 1758, 1770-72 (1984), supports the intersession interpretation. It provides:

> That in every case where any officer, the right of whose appointment is by this Constitution vested in the General Assembly, shall, during their recess,

> die, or his office by other means become vacant, the Governor shall have power, with the advice of the Council of State, to fill up such vacancy, by granting a temporary commission, which shall expire at the end of the next session of the General Assembly.

N.C. Const. of 1776, art. XX, *reprinted in* 7 Sources and Documents of United States Constitutions 406 (1978). This provision, like the Recess Appointments Clause, describes a singular recess and does not use the word "adjournment." And an 1819 North Carolina Supreme Court case dealing with this provision implies that the provision was seen as differentiating between "the session of the General Assembly" and "the recess of the General Assembly." *Beard v. Cameron*, 7 N.C. (3 Mur.) 181 (1819) (opinion of Taylor, C.J.).

The Board argues that "the Company's view would . . . upend the established constitutional balance of power between the Senate and the President with respect to presidential appointments." Resp't. Br. at 13. However, the Board's view of "the established constitutional balance" is neither so well established nor so clear as the Board seems to think. In fact, the historical role of the Recess Appointments Clause is neither clear nor consistent.

The interpretation of the Clause in the years immediately following the Constitution's ratification is the most instructive historical analysis in discerning the original meaning. Indeed, such early interpretation is a "critical tool of constitutional interpretation" because it reflects the "public understanding" of the text

"in the period after its . . . ratification." *Heller*, 128 S. Ct. at 2804-05. With respect to the Recess Appointments Clause, historical practice strongly supports the intersession interpretation. The available evidence shows that no President attempted to make an intrasession recess appointment for 80 years after the Constitution was ratified. Michael A. Carrier, Note, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2211 (1994). The first intrasession recess appointment probably did not come until 1867, when President Andrew Johnson apparently appointed one district court judge during an intrasession adjournment. *See* Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 408-09 (2005). It is not even entirely clear that the Johnson appointment was made during an intrasession recess. *See id.* at 409 n.136.

Presidents made only three documented intrasession recess appointments prior to 1947, with the other two coming during the presidencies of Calvin Coolidge and Warren Harding. *See* Carrier, *supra*, at 2209-12, 2235; *see also Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 1, 5 (2012), *available at* http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf ("2012 OLC Memo").

Whatever the precise number of putative intrasession recess appointments before 1947, it is well established that for at least 80 years after the ratification of the Constitution, no President attempted such an ap-

pointment, and for decades thereafter, such appointments were exceedingly rare. The Supreme Court in *Printz v. United States*, exploring the reach of federal power over the states, deemed it significant that the early Congress had not attempted to exercise the questioned power. 521 U.S. 898 (1997). Paralleling the Supreme Court's reasoning in *Printz*, we conclude that the infrequency of intrasession recess appointments during the first 150 years of the Republic "suggests an assumed *absence* of [the] power" to make such appointments. *Id.* at 908. Though it is true that intrasession recesses of significant length may have been far less common in those early days than today, *see* Carrier, *supra*, at 2211, it is nonetheless the case that the appointment practices of Presidents more nearly contemporaneous with the adoption of the Constitution do not support the propriety of intrasession recess appointments. Their early understanding of the Constitution is more probative of its original meaning than anything to be drawn from administrations of more recent vintage.

While the Board seeks support for its interpretation in the practices of more recent administrations, we do not find those practices persuasive. We note that in *INS v. Chadha*, when the Supreme Court was considering the constitutionality of a one-house veto, it considered a similar argument concerning the increasing frequency of such legislative veto provisions. 462 U.S. 919, 944-45 (1983). In rejecting that argument, the *Chadha* Court stated that "our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing fre-

quency. . . ." *Id.* at 944. Like the Supreme Court in *Chadha*, we conclude that practice of a more recent vintage is less compelling than historical practice dating back to the era of the Framers.

Likewise, in *Myers v. United States*, the Court considered a statutory limitation on the President's power to remove his appointees. 272 U.S. 52 (1926). In a powerful tribute to the strength of interpretations from the time of the ratification, Chief Justice Taft, writing for the Court, gave almost dispositive weight to the First Congress's construction of the Constitution on the question of the President's removal power. *See id.* at 174-75. The Court expressly valued the early practice over recent 1870s legislation inconsistent with the early understanding.

The Constitution's overall appointments structure provides additional confirmation of the intersession interpretation. The Framers emphasized that the recess appointment power served only as a stopgap for times when the Senate was unable to provide advice and consent. Hamilton wrote in *Federalist No. 67* that advice and consent "declares the general mode of appointing officers of the United States," while the Recess Appointments Clause serves as "nothing more than a supplement to the other for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate." The Federalist No. 67, *supra*, at 408. The "general mode" of participation of the Senate through advice and consent served an important function: "It would be an excellent check upon a spirit of favoritism in the

President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." The Federalist No. 76, *supra*, at 456.

Nonetheless, the Framers recognized that they needed some temporary method for appointment when the Senate was in the recess. At the time of the Constitution, intersession recesses were regularly six to nine months, Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1498 (2005), and senators did not have the luxury of catching the next flight to Washington. To avoid government paralysis in those long periods when senators were unable to provide advice and consent, the Framers established the "auxiliary" method of recess appointments. But they put strict limits on this method, requiring that the relevant vacancies happen during "the Recess." It would have made little sense to extend this "auxiliary" method to any intrasession break, for the "auxiliary" ability to make recess appointments could easily swallow the "general" route of advice and consent. The President could simply wait until the Senate took an intrasession break to make appointments, and thus "advice and consent" would hardly restrain his appointment choices at all.

To adopt the Board's proffered intrasession interpretation of "the Recess" would wholly defeat the purpose of the Framers in the careful separation of powers structure reflected in the Appointments Clause.

As the Supreme Court observed in *Freytag v. Commissioner of Internal Revenue*, "The manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." 501 U.S. 868, 883 (1991) (internal quotation marks and citation omitted). In short, the Constitution's appointments structure—the general method of advice and consent modified only by a limited recess appointments power when the Senate simply cannot provide advice and consent—makes clear that the Framers used "the Recess" to refer only to the recess between sessions.

Confirming this understanding of the Recess Appointments Clause is the lack of a viable alternative interpretation of "the Recess." The first alternative interpretation is that "the Recess" refers to all Senate breaks. But no party presses that interpretation, and for good reason. *See* Resp't Br. at 65 (conceding that "a routine adjournment for an evening, a weekend, or a lunch break occurring during regular working sessions of the Senate does not constitute a 'Recess of the Senate' under the Recess Appointments Clause"). As discussed above, the appointments structure would have been turned upside down if the President could make appointments any time the Senate so much as broke for lunch. This interpretation also cannot explain the use of the definite article "the," the singular "Recess" in the Clause, or why the Framers used "adjournment" differently from "Recess."

The second possible interpretation is that "the Recess" is a practical term that refers to some substantial passage of time, such as a ten- or twenty-day break. Attorney General Daugherty seemed to abandon the intersession interpretation in 1921 and adopted this functional interpretation, arguing that "[t]o give the word 'recess' a technical and not a practical construction, is to disregard substance for form." 33 Op. Att'y Gen. 20, 22 (1921). Daugherty refused to put an exact time on the length of the break necessary for a "Recess," stating that "[i]n the very nature of things the line of demarcation cannot be accurately drawn." *Id.* at 25.

We must reject Attorney General Daugherty's vague alternative in favor of the clarity of the intersession interpretation. As the Supreme Court has observed, when interpreting "major features" of the Constitution's separation of powers, we must "establish[] high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). Thus, the inherent vagueness of Daugherty's interpretation counsels against it. Given that the appointments structure forms a major part of the separation of powers in the Constitution, the Framers would not likely have introduced such a flimsy standard. Moreover, the text of the Recess Appointments Clause offers no support for the functional approach. Some undefined but substantial number of days-break is not a plausible interpretation of "the Recess."

A third alternative interpretation of "the Recess" is that it means any adjournment of more than three days pursuant to the Adjournments Clause. *See* U.S. Const. art. I, § 5, cl. 4 ("Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days. . . ."). This interpretation lacks any constitutional basis. The Framers did not use the word "adjournment" in the Recess Appointments Clause. Instead, they used "the Recess." The Adjournments Clause and the Recess Appointments Clause exist in different contexts and contain no hint that they should be read together. Nothing in the text of either Clause, the Constitution's structure, or its history suggests a link between the Clauses. Without any evidence indicating that the two Clauses are related, we cannot read one as governing the other. We will not do violence to the Constitution by ignoring the Framers' choice of words.

The fourth and final possible interpretation of "the Recess," advocated by the Office of Legal Counsel, is a variation of the functional interpretation in which the President has discretion to determine that the Senate is in recess. *See* 2012 OLC Memo, *supra*, at 23 ("[T]he President therefore has discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments."). This will not do. Allowing the President to define the scope of his own appointments power would eviscerate the Constitution's separation of powers. The checks and balances that the Constitution places on each branch of government serve as "self-executing safeguard[s] against the en-

croachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). An interpretation of "the Recess" that permits the President to decide when the Senate is in recess would demolish the checks and balances inherent in the advice-and-consent requirement, giving the President free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction. This cannot be the law. The intersession interpretation of "the Recess" is the only one faithful to the Constitution's text, structure, and history.

The Board's arguments supporting the intrasession interpretation are not convincing. The Board relies on an Eleventh Circuit opinion holding that "the Recess" includes intrasession recesses. *See Evans v. Stephens*, 387 F.3d 1220, 1224 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005). The *Evans* court explained that contemporaneous dictionaries defined "recess" broadly as "remission and suspension of any procedure." *Id.* (quoting 2 Johnson, *supra*, at 1650). The court also dismissed the importance of the definite article "the," discounted the Constitution's distinction between "adjournment" and "Recess" by interpreting "adjournment" as a parliamentary *action*, and emphasized the prevalence of intrasession recess appointments in recent years. *See id.* at 1225-26.

While we respect our sister circuit, we find the *Evans* opinion unconvincing. Initially, we note that the Eleventh Circuit's analysis was premised on an

incomplete statement of the Recess Appointments Clause's purpose: "to enable the President to fill vacancies to assure the proper functioning of our government." *Id.* at 1226. This statement omits a crucial element of the Clause, which enables the President to fill vacancies *only when the Senate is unable to provide advice and consent*. *See, e.g.*, 2012 OLC Memo, *supra*, at 10 ("[T]he recess appointment power is required to address situations in which the Senate is unable to provide advice and consent on appointments."). As we have explained, the Clause deals with the Senate's being unable to provide advice and consent only during "the Recess," *viz.*, an intersession recess. As written, the Eleventh Circuit's statement disregards the full structure of the Constitution's appointments provision, which makes clear that the recess appointments method is secondary to the primary method of advice and consent. The very existence of the advice and consent requirement highlights the incompleteness of the Eleventh Circuit's broad statement of constitutional purpose.

Nor are we convinced by the Eleventh Circuit's more specific arguments. First, the natural meaning of "the Recess" is more limited than the broad dictionary definition of "recess." In context, "the Recess" refers to a specific state of the legislature, so sources other than general dictionaries are more helpful in elucidating the term's original public meaning. *See Virginia*, 148 U.S. at 519 ("[T]he meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used."). Indeed, it is telling that even the Board concedes that "Recess"

does not mean *all* breaks, *see* Resp't Br. at 65, which is the interpretation suggested by the dictionary definition. *See* 2 Johnson, *supra*, at 1650 (defining "recess" as the "remission and suspension of any procedure").

Second, the Eleventh Circuit fails to explain the use of the singular "Recess," and it underestimates the significance of the definite article "the" preceding "Recess" by relying on twentieth-century dictionaries to argue that "the" can come before a generic term. *See Evans*, 387 F.3d at 1224-25. Contemporaneous dictionaries treated "the" as "noting a *particular* thing." 2 Johnson, *supra*, at 2041 (emphasis added).

Third, as the Eleventh Circuit acknowledged, the Supreme Court has suggested that the Constitution does not in fact only use "adjournment" to denote parliamentary action. *See Evans*, 387 F.3d at 1225 (citing *Wright v. United States*, 302 U.S. 583 (1938)).

In fact, the Constitution uses "adjournment" to refer generally to legislative breaks. It uses "the Recess" differently and then incorporates the definite article. Thus, the Eleventh Circuit's interpretation of "adjournment" fails to distinguish between "adjournment" and "Recess," rendering the latter superfluous and ignoring the Framers' specific choice of words. *Cf. Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840) (plurality opinion) ("In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot

be presumed that any clause in the constitution is intended to be without effect. . . .").

The Board offers as an example of an early interpretation of "the Recess" consistent with its view the case of a senator appointed by the governor of New Jersey to fill a vacated seat in the United States Senate pursuant to Article I, Section 3, Clause 2. Under that clause, "if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." U.S. Const. art. I, § 3, cl. 2. In the example relied upon by the Board, Franklin Davenport was "appointed a Senator by the Executive of the State of New Jersey, in the recess of the Legislature" and "took his seat in the Senate." 8 Annals of Cong. 2197 (1798). The Board then offers evidence that the New Jersey Legislative Council Journal, 23d Session 20-21 (1798-99), documents an intrasession recess at the apparent time of Davenport's appointment. We do not find this persuasive. Nothing in the Annals of Congress establishes that Congress considered or even knew that the appointment was made during an intrasession recess of the legislature. The example offers at most the understanding of one state governor, not a common understanding of "the Recess" as used in the Recess Appointments Clause.

Finally, we would make explicit what we have implied earlier. The dearth of intrasession appointments in the years and decades following the ratifica-

tion of the Constitution speaks far more impressively than the history of recent presidential exercise of a supposed power to make such appointments. Recent Presidents are doing no more than interpreting the Constitution. While we recognize that all branches of government must of necessity exercise their understanding of the Constitution in order to perform their duties faithfully thereto, ultimately it is our role to discern the authoritative meaning of the supreme law.

As Chief Justice Marshall made clear in *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." 5 U.S. (1 Cranch) at 177. In *Marbury*, the Supreme Court established that if the legislative branch has acted in contravention of the Constitution, it is the courts that make that determination. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court made clear that the courts must make the same determination if the executive has acted contrary to the Constitution. 343 U.S. 579 (1952). That is the case here, and we must strike down the unconstitutional act.

In short, we hold that "the Recess" is limited to intersession recesses. The Board conceded at oral argument that the appointments at issue were not made during the intersession recess: the President made his three appointments to the Board on January 4, 2012, after Congress began a new session on January 3

and while that new session continued. 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012). Considering the text, history, and structure of the Constitution, these appointments were invalid from their inception. Because the Board lacked a quorum of three members when it issued its decision in this case on February 8, 2012, its decision must be vacated. *See* 29 U.S.C. § 153(b); *New Process Steel*, 130 S. Ct. at 2644-45.

B. Meaning of "Happen"

Although our holding on the first constitutional argument of the petitioner is sufficient to compel a decision vacating the Board's order, as we suggested above, we also agree that the petitioner is correct in its understanding of the meaning of the word "happen" in the Recess Appointments Clause. The Clause permits only the filling up of "Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. Our decision on this issue depends on the meaning of the constitutional language "that may happen during the Recess." The company contends that "happen" means "arise" or "begin" or "come into being." The Board, on the other hand, contends that the President may fill up any vacancies that "happen to exist" during "the Recess." It is our firm conviction that the appointments did not occur during "the Recess." We proceed now to determine whether the appointments are also invalid as the vacancies did not "happen" during "the Recess."

In determining the meaning of "happen" in the Recess Appointments Clause, we begin our analysis as we did in the first issue by looking to the natural meaning

of the text as it would have been understood at the time of the ratification of the Constitution. *See Heller*, 128 S. Ct. at 2788. Upon a simple reading of the language itself, we conclude that the word "happen" could not logically have encompassed any vacancies that happened to exist during "the Recess." If the language were to be construed as the Board advocates, the operative phrase "that may happen" would be wholly unnecessary. Under the Board's interpretation, the vacancy need merely exist during "the Recess" to trigger the President's recess appointment power. The Board's interpretation would apply with equal force, however, irrespective of the phrase "that may happen." Its interpretation therefore deprives that phrase of any force. By effectively reading the phrase out of the Clause, the Board's interpretation once again runs afoul of the principle that every phrase of the Constitution must be given effect. *See Marbury*, 5 U.S. (1 Cranch) at 174 ("It cannot be presumed that any clause in the constitution is intended to be without effect. . . .").

For our logical analysis of the language with respect to the meaning of "happen" to be controlling, we must establish that it is consistent with the understanding of the word contemporaneous with the ratification. Dictionaries at the time of the Constitution defined "happen" as "[t]o fall out; to chance; to come to pass." 1 Johnson, *supra*, at 965; *see also Evans*, 387 F.3d at 1230 & n.4 (Barkett, J., dissenting) (surveying a variety of eighteenth-century dictionaries and concluding that they all defined "happen" similarly). A vacancy happens, or "come[s] to pass," only when it

first arises, demonstrating that the Recess Appointments Clause requires that the relevant vacancy arise during the recess. The term "happen" connotes an event taking place—an action—and it would be plainly incorrect to say that an event happened during some period of time when in fact it happened before that time.

In addition to the logic of the language, there is ample other support for this conclusion. First, we repair again to examination of the structure of the Constitution. If we accept the Board's construction, we eviscerate the primary mode of appointments set forth in Article II, Section 2, Clause 2. It would have made little sense to make the primary method of appointment the cumbersome advice and consent procedure contemplated by that Clause if the secondary method would permit the President to fill up all vacancies regardless of when the vacancy arose. A President at odds with the Senate over nominations would never have to submit his nominees for confirmation. He could simply wait for a "recess" (however defined) and then fill up all vacancies.

We further note that the "arise" interpretation is consistent with other usages of "happen" in the Constitution. Article I, Section 3, Clause 2, the Senate Vacancies Clause, provides for the filling of vacancies in Senate seats. Though now amended, at the time of the adoption of the Constitution, that section stated: "if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments

until the next Meeting of the Legislature, which shall then fill such Vacancies." U.S. Const. art. I, § 3, cl. 2. That Clause makes sense if "happen . . . during the Recess" refers to arising or coming into being during "the Recess." If it merely means that the vacancy happens to exist at the time of a recess, it becomes implausible.

Our construction of "happen" as meaning "arise" in the Recess Appointments Clause is consistent with the use of the same wording in the Senate Vacancies Clause. It is well established that "inconsistency [within the Constitution] is to be implied only where the context clearly requires it." *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 587 (1949). Our understanding of the plain meaning of the Recess Appointments Clause as requiring that a qualifying vacancy must have come to pass or arisen "during the Recess" is consistent with the apparent meaning of the Senate Vacancies Clause. The interpretation proffered by the Board is not.

As with the first issue, we also find that evidence of the earliest understanding of the Clause is inconsistent with the Board's position. It appears that the first President, who took office shortly after the ratification, understood the recess appointments power to extend only to vacancies that arose during senatorial recess. More specifically, President Washington followed a practice that strongly suggests that he understood "happen" to mean "arise." If not enough time remained in the session to ask a person to serve in an office, President Washington would nominate a person

without the nominee's consent, and the Senate would confirm the individual before recessing. *See* Rappaport, *supra*, at 1522. Then, if the person declined to serve during the recess, thereby creating a new vacancy during the recess, President Washington would fill the position using his recess appointment power. *Id.* If President Washington and the early Senate had understood the word "happen" to mean "happen to exist," this convoluted process would have been unnecessary.

In 1792, Edmund Randolph, the first Attorney General, addressed the issue of an office that had become vacant during the session when the Secretary of State sought his view. Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), *in* 24 The Papers of Thomas Jefferson 165, 165-67 (John Catanzariti et al. eds., 1990) ("Randolph Opinion"). Addressing the vacancy, concluding that it did not "happen" during the recess, and thereby rejecting the "exist" interpretation, Randolph wrote:

> But is it a vacancy which has *happened* during the recess of the Senate? It is now the same and no other vacancy, than that, which existed on the 2nd. of April 1792. It commenced therefore on that day or may be said to have *happened* on that day.

Id. at 166.

Alexander Hamilton, similarly, wrote that "[i]t is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate." Letter from Alexander Hamilton to James McHenry (May 3, 1799), *in* 23

The Papers of Alexander Hamilton 94, 94 (Harold C. Syrett ed., 1976); *see also* The Federalist No. 67, *supra*, at 408 (explaining the purpose of the Clause by stating that "vacancies might happen *in their recess*" (emphasis in original)). In March 1814, Senator Christopher Gore argued that the Clause's scope is limited to "vacanc[ies] that may happen during the recess of the Senate":

> If the vacancy happens at another time, it is not the case described by the Constitution; for that specifies the precise space of time wherein the vacancy must happen, and the times which define this period bring it emphatically within the ancient and well-established maxim: "Expressio unius est exclusio alterius."

26 Annals of Cong. 653 (1814); *see United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988) (defining the interpretive canon of "expressio unius est exclusio alterius" as "the expression of one is the exclusion of others" (italics omitted)).

Additional support for the "arise" interpretation comes from early interpreters who understood that the Clause only applied to vacancies where the office had previously been occupied, as opposed to vacancies that existed because the office had been newly created. Justice Joseph Story explained that "[t]he word 'happen' had relation to some casualty," a statement consistent with the arise interpretation. 3 Joseph Story, Commentaries on the Constitution § 1553 (1833) ("Story's Commentaries"), *reprinted in* 4 The Found-

ers' Constitution 122 (Philip B. Kurland & Ralph Lerner eds., 1987).

We recognize that some circuits have adopted the "exist" interpretation. *See Evans*, 387 F.3d at 1226-27; *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Those courts, however, did not focus their analyses on the original public meaning of the word "happen." In arguing that happen could mean "exist," the *Evans* majority used a modern dictionary to define "happen" as "befall," and then used the same modern dictionary to define "befall" as "happen to be." *See* 387 F.3d at 1226 (quoting 6 Oxford English Dictionary 1096 (2d ed. 1989); 2 *id.* at 62). As the *Evans* dissent argued, "[t]his is at best a strained effort to avoid the available dictionary evidence." *Id.* at 1230 n.4 (Barkett, J., dissenting). A modern cross-reference is not a contemporary definition. The Board has offered no dictionaries from the time of the ratification that define "happen" consistently with the proffered definition of "happen to exist."

The *Evans* majority also relied on a handful of recess appointments supposedly made by Presidents Washington and Jefferson to offices that became vacant prior to the recess. *Id.* at 1226 (majority opinion). Subsequent scholarship, however, has demonstrated that these appointments were "in fact examples of the practice of appointing an individual without his consent and then, if he turns down the appointment during the recess, making a recess appointment at that time." Rappaport, *supra*, at 1522 n.97. Again, as

with the appointments by President Washington referenced above, the use of this convoluted method of appointment demonstrates that early interpreters read "happen" as "arise."

The *Evans*, *Woodley*, and *Allocco* courts all relied on supposed congressional acquiescence in the practice of making recess appointments to offices that were vacant prior to the recess because 5 U.S.C. § 5503 permits payment to such appointees in some circumstances. *See Evans*, 387 F.3d at 1226-27; *Woodley*, 751 F.2d at 1013; *Allocco*, 305 F.2d at 715 (referring to § 5503's predecessor statute); *see also* 5 U.S.C. § 5503 (denying recess appointees payment "if the vacancy [they filled] existed while the Senate was in session," subject to certain exceptions).

Section 5503 was passed in 1966. Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378, 475. Its similar predecessor statute was passed in 1940. Act of July 11, 1940, ch. 580, 54 Stat. 751. The enactment of statutes in 1940 and 1966 sheds no light on the original understanding of the Constitution. This is particularly true as prior statutes refused payments of salaries to all recess appointees whose vacancies arose during the session. *See* Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646 (stating that no "money [shall] be paid out of the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, which vacancy existed while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed

by the Senate"); 5 U.S.C. § 56 (1934). We doubt that our sister circuits are correct in construing this legislation as acquiescent. The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist "the overgrown prerogatives of the other branches of government." The Federalist No. 58, *supra*, at 357. The 1863 Act constitutes precisely that: resistance to executive aggrandizement. In any event, if the Constitution does not empower the President to make the appointments, "[n]either Congress nor the Executive can agree to waive . . . structural protection[s]" in the Appointments Clause. *Freytag*, 501 U.S. at 880; *cf. Chadha*, 462 U.S. at 942 n.13 ("The assent of the Executive to a bill which contains a provision contrary to the Constitution does not shield it from judicial review.").

As we recalled in our analysis of the first issue, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Marbury*, 5 U.S. (1 Cranch) at 177. The Senate's desires do not determine the Constitution's meaning. The Constitution's separation of powers features, of which the Appointments Clause is one, do not simply protect one branch from another. *See Freytag*, 501 U.S. at 878. These structural provisions serve to protect the *people*, for it is ultimately the people's rights that suffer when one branch encroaches on another. As Madison explained in *Federalist No. 51*, the division of power between the

branches forms part of the "security [that] arises to the rights of the people." The Federalist No. 51, *supra*, at 320. Or as the Supreme Court held in *Freytag*, "The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." 501 U.S. at 880. In short, nothing in 5 U.S.C. § 5503 changes our view that the original meaning of "happen" is "arise."

Our sister circuits and the Board contend that the "arise" interpretation fosters inefficiencies and leaves open the possibility of just what is occurring here—that is, a Board that cannot act for want for a quorum. The Board also suggests more dire consequences, arguing that failure to accept the "exist" interpretation will leave the President unable to fulfill his chief constitutional obligation to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and even suggests that the interpretation we adopt today could pose national security risks. *See Noel Canning v. NLRB*, No. 12-1115, Oral Argument Tr. at 52 (D.C. Cir. Dec. 5, 2012). But if Congress wished to alleviate such problems, it could certainly create Board members whose service extended until the qualification of a successor, or provide for action by less than the current quorum, or deal with any inefficiencies in some other fashion. And our suggestion that Congress can address this issue is no mere hypothesis. The two branches have repeatedly, and thoroughly, addressed the problems of vacancies in the executive branch. Congress has provided for the temporary filling of a vacancy in a particular executive office by an "acting" officer authorized to perform all of the duties and

exercise all of the powers of that office, *see, e.g.*, 28 U.S.C. § 508 (Attorney General); 29 U.S.C. § 552 (Secretary of Labor), including key national security positions. *See, e.g.*, 10 U.S.C. § 132(b) (Secretary of Defense); *id.* § 154(d), (e) (Chairman, Joint Chiefs of Staff); 50 U.S.C. § 403-3a(a) (Director of National Intelligence); *id.* § 403-4c(b)(2) (Director of Central Intelligence Agency); *see also* S. Rep. No. 105-250, at 16-17 (1998) (listing other provisions). Moreover, Congress statutorily addressed the filling of vacancies in the executive branch not otherwise provided for. *See* 5 U.S.C. §§ 3345-3349d.

Congress has also addressed the problem of vacancies on various multimember agencies, providing that members may continue to serve for some period past the expiration of their commissions until successors are nominated and confirmed. *See, e.g.*, 7 U.S.C. § 2(a)(2)(A) (Commodities Futures Trading Commission); 15 U.S.C. § 78d(a) (Securities and Exchange Commission); 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory Commission); 47 U.S.C. § 154(c) (Federal Communications Commission). And we have cited only a fraction of the multimember boards for which Congress has provided such potential extensions.

Admittedly, Congress has chosen not to provide for acting NLRB members. *See* 5 U.S.C. § 3349c(1)(A). But that choice cannot support the Board's interpretation of the Clause. We cannot accept an interpretation of the Constitution completely divorced from its original meaning in order to resolve exigencies created by—and equally remediable by—the executive and

legislative branches. And as the Supreme Court expressly noted in *New Process Steel*, in the context of the Board, "[i]f Congress wishes to allow the Board to decide cases with only two members, it can easily do so." 130 S. Ct. at 2645.

In any event, if some administrative inefficiency results from our construction of the original meaning of the Constitution, that does not empower us to change what the Constitution commands. As the Supreme Court observed in *INS v. Chadha*, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." 462 U.S. at 944. It bears emphasis that "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." *Id.*

The power of a written constitution lies in its words. It is those words that were adopted by the people. When those words speak clearly, it is not up to us to depart from their meaning in favor of our own concept of efficiency, convenience, or facilitation of the functions of government. In light of the extensive evidence that the original public meaning of "happen" was "arise," we hold that the President may only make recess appointments to fill vacancies that arise during the recess.

Applying this rule to the case before us, we further hold that the relevant vacancies did not arise during the intersession recess of the Senate. The three Board seats that the President attempted to fill on

January 4, 2012, had become vacant on August 27, 2010, August 27, 2011, and January 3, 2012, respectively. *See* Part III, *supra* (showing the dates for Chairman Liebman and Members Schaumber and Becker's departures). On August 27, 2010, the Senate was in the midst of an intrasession recess, so the vacancy that arose on that date did not arise during "the Recess" for purposes of the Recess Appointments Clause. *See* Congressional Directory for the 112th Congress 538 (2011). Similarly, the Senate was in an intrasession recess on August 27, 2011, so the vacancy that arose on that date also did not qualify for a recess appointment. *See id.*

The seat formerly occupied by Member Becker became vacant at the "End" of the Senate's session on January 3, 2012—it did not "happen during the Recess of the Senate." First, this vacancy could not have arisen during an intersession recess because the Senate did not take an intersession recess between the first and second sessions of the 112th Congress.

It has long been the practice of the Senate, dating back to the First Congress, to conclude its sessions and enter "the Recess" with an adjournment *sine die*.[1]

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[1] *See* Congressional Directory for the 112th Congress, *supra*, at 522–38 (listing all of the Senate's intersession recesses prior to 2012); *see, e.g.*, 156 Cong. Rec. S11,070 (daily ed. Dec. 22, 2010) (concluding Second Session of 111th Congress with adjournment *sine die*); 147 Cong. Rec. 27,953 (2001) (concluding First Session of 107th Congress with adjournment *sine die*); 139 Cong. Rec. 32,433 (1993) (concluding First Session of 103d Congress with adjournment *sine die*); 128 Cong. Rec. 33,629 (1982) (concluding Second Session of the 97th Congress with adjournment *sine die*); 125 Cong.

The Senate has followed this practice even for relatively brief intersession recesses.[2]

Rec. 37,605 (1979) (concluding First Session of 96th Congress with adjournment *sine die*); 117 Cong. Rec. 47,658 (1971) (concluding First Session of the 92d Congress with adjournment *sine die*); 105 Cong. Rec. 19,688 (1959) (concluding First Session of 86th Congress with adjournment *sine die*); 91 Cong. Rec. 12,525 (1945) (concluding First Session of 79th Congress with adjournment *sine die*); 65 Cong. Rec. 11,202 (1924) (concluding First Session of 68th Congress with adjournment *sine die*); 45 Cong. Rec. 9,080 (1910) (concluding Second Session of 61st Congress with adjournment *sine die*); 23 Cong. Rec. 7,081 (1892) (concluding First Session of 52d Congress with adjournment *sine die*); Cong. Globe, 42d Cong., 2d Sess. 4,504 (1872) (concluding Second Session of 42d Congress with adjournment *sine die*); Cong. Globe, 23d Cong., 1st Sess. 480 (1834) (concluding First Session of 23d Congress with adjournment *sine die*); 29 Annals of Cong. 372 (1816) (concluding First Session of 14th Congress with adjournment *sine die*); 3 Annals of Cong. 668 (1793) (concluding Second Session of 2d Congress with adjournment *sine die*); 2 Annals of Cong. 1786 (1791) (concluding Third Session of 1st Congress with adjournment *sine die*).

[2] *See, e.g.*, 154 Cong. Rec. 24,808 (2009) (concluding Second Session of 110th Congress and entering three-day intersession recess with adjournment *sine die*); 141 Cong. Rec. 38,608 (1996) (concluding First Session of 104th Congress and entering momentary intersession recess with adjournment *sine die*); 137 Cong. Rec. 36,364 (1992) (concluding First Session of 102d Congress with adjournment *sine die* at the same time that the Second Session began); 109 Cong. Rec. 25,674 (1963) (concluding First Session of 88th Congress and entering eight-day intersession recess with adjournment *sine die*); 96 Cong. Rec. 17,121 (1951) (concluding Second Session of 81st Congress and entering one-day intersession recess with adjournment *sine die*); 94 Cong. Rec. 10,264 (1948) (concluding Second Session of 80th Congress and entering three-day intersession recess with adjournment *sine die*); 87 Cong. Rec. 10,143 (1942) (concluding First Session of 77th Congress and entering three-day

Indeed, various acts of Congress refer to the adjournment *sine die* as the conclusion of the session. *See, e.g.*, 2 U.S.C. § 682(5) (for purpose of congressional budget consideration, "continuity of a session of the Congress shall be considered as broken only by an adjournment of the Congress sine die"); 5 U.S.C. § 906(b)(1) (for purpose of agency reorganization plans, "continuity of session is broken only by an adjournment of Congress sine die").

We find a recent example of this longstanding practice, with dates nearly identical to those in this case, to be particularly instructive. On December 31, 2007, the Senate met in *pro forma* session and concluded the First Session of the 110th Congress, and entered "the Recess," with an adjournment *sine die*. *See* Congressional Directory for the 112th Congress, *supra*, at 537 (confirming that the First Session of the 110th Congress ended on December 31, 2007); 153 Cong. Rec. 36,508 (2007) (adjourning Senate *sine die*). It then convened the Second Session of the 110th Congress with a *pro forma* session on January 3, 2008. *See* Congressional Directory for the 112th Congress, *supra*, at 537 (confirming that the Second Session of the 110th Congress began on January 3, 2008); 154 Cong. Rec. 2 (2008) (convening Second Session).

Because, in this case, the Senate declined to adjourn *sine die* on December 30, 2011, it did not enter an intersession recess, and the First Session of the

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intersession recess with adjournment *sine die*); 76 Cong. Rec. 5,656 (1933) (concluding Second Session of 72d Congress and entering one-day intersession recess with adjournment *sine die*).

112th Congress expired simultaneously with the beginning of the Second Session. *See, e.g.*, 86 Cong. Rec. 14,059 (1941) (noting that, in the absence of an adjournment *sine die* on January 3, 1941, "[t]he third session of the Seventy-sixth Congress expired automatically, under constitutional limitation, when the hour of 12 o'clock arrived").

Although the December 17, 2011, scheduling order specifically provided that the Second Session of the 112th Congress would convene on January 3, 2012, *see* 157 Cong. Rec. S8,783 (daily ed. Dec. 17, 2011), it did not specify when the First Session would conclude. And, at the last *pro forma* session before the January 3, 2012, session, the Senate adjourned to a date certain: January 3, 2012. *See* 157 Cong. Rec. S8,793 (daily ed. Dec. 30, 2011). Because the Senate did not adjourn *sine die*, it did not enter "the Recess" between the First and Second Sessions of the 112th Congress. Becker's appointment therefore expired at the end of the First Session on January 3, 2012, and the vacancy in that seat could not have "happen[ed]" during "the Recess" of the Senate.

Second, in any event, the Clause states that a recess appointment expires "at the End of [the Senate's] next Session," U.S. Const. art. II, § 2, cl. 3, not "at the beginning of the Senate's next Recess." Likewise, the structure of Article II, Section 2 supports this reading, for "it makes little sense to allow a second consecutive recess appointment for the same position, because the President and the Senate would have had an entire Senate session during the first recess appointment to

nominate and confirm a permanent appointee." Rappaport, *supra*, at 1509. The January 3, 2012, vacancy thus did not arise during the recess, depriving the President of power to make an appointment under the Recess Appointments Clause. Because none of the three appointments were valid, the Board lacked a quorum and its decision must be vacated. *See* 29 U.S.C. § 153(b); *New Process Steel*, 130 S. Ct. at 2644-45.

Even if the "End" of the session were "during the Recess," meaning that the January 3, 2012, vacancy arose during some imaginary recess, we hold that the appointment to that seat is invalid because the President must make the recess appointment during the same intersession recess when the vacancy for that office arose. The Clause provides that a recess appointee's commission expires at "the End of [the Senate's] next Session," which the Framers understood as "the end of the *ensuing* session." The Federalist No. 67, *supra*, at 408 (emphasis added).

Consistent with the structure of the Appointments Clause and the Recess Appointments Clause exception to it, the filling up of a vacancy that happens during a recess must be done during the same recess in which the vacancy arose. There is no reason the Framers would have permitted the President to wait until some future intersession recess to make a recess appointment, for the Senate would have been sitting in session during the intervening period and available to consider nominations. The earliest authoritative commentary on the Constitution explains that the purpose of the

Recess Appointments Clause was to give the President authorization "to make temporary appointments during the recess, which should expire, when the senate should have had an opportunity to act on the subject." Story's Commentaries, *supra*, § 1551, *reprinted in* 4 The Founders' Constitution, *supra*, at 122; *see also Evans*, 387 F.3d at 1233 (Barkett, J., dissenting).

As with the first issue, we hold that the petitioner's understanding of the constitutional provision is correct, and the Board's is wrong. The Board had no quorum, and its order is void.

V. The Motion for Intervention

As we referenced early in this opinion, we have before us a motion for intervention. The Chamber of Commerce and the Coalition for a Democratic Workplace seek to intervene. It is the law of this circuit that litigants seeking to intervene in cases involving direct review of administrative actions must establish Article III standing. *See Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 538-39 (D.C. Cir. 1999). Our judicial power is limited to "Cases" or "Controversies," U.S. Const. art. III, § 2, cl. 1, meaning that litigants must show "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 551 (1996).

The movants claim to have "associational standing." In that context, the Supreme Court has explained that "an association has standing to bring suit on behalf of

its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

We need not decide the question of the movants' standing. Our precedent is clear: "[I]f one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case." *Ry. Labor Execs.' Ass'n v. United States*, 987 F.2d 806, 810 (D.C. Cir. 1993) (per curiam); *see also Doe v. Bolton*, 410 U.S. 179, 189 (1973) ("We conclude that we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by [the original appellants], and nothing is gained or lost by the presence or absence of [the additional appellants].").

Noel Canning has standing. The case, like other petitions for review of administrative adjudications, proceeded between the party to the administrative adjudication and the agency. We reached our decision. The motion is now moot, and we order it dismissed. The Chamber could have had its say by filing as an amicus, but for reasons satisfactory to itself, chose to attempt a strained claim of intervenor status.

CONCLUSION

For the reasons set forth above, we grant the petition of Canning and vacate the Board's order. We

deny the cross-petition of the Board for enforcement of its invalid order.

So ordered.

GRIFFITH, *Circuit Judge*, concurring in the opinion except as to Part IV.B and concurring in the judgment:

The majority acknowledges that our holding on intrasession recess appointments is sufficient to vacate the Board's order, *see supra* slip op. at 30 [p. 35a, *supra*], and I would stop our constitutional analysis there. If we need not take up a constitutional issue, we should not. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (noting the "deeply rooted commitment not to pass on questions of constitutionality unless adjudication of the constitutional issue is necessary" (internal quotation marks omitted)); *Dames & Moore v. Regan*, 453 U.S. 654, 660-61 (1981) (highlighting the Court's "attempt to confine the opinion to the very questions necessary to decision of the case"); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) ("The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885))). I agree that the Executive's view that the President can fill vacancies that "happen to exist" during "the Recess" is suspect, but that position dates back to at least the 1820s, *see* Exec. Auth. To Fill Vacancies, 1 Op. Att'y Gen. 631, 633-34 (1823), making it more venerable than the much more recent practice

of intrasession recess appointments. *See Mistretta v. United States*, 488 U.S. 361, 399-400 (1989); *INS v. Chadha*, 462 U.S. 919, 944-45 (1983). We should not dismiss another branch's longstanding interpretation of the Constitution when the case before us does not demand it.

APPENDIX B

Case No. 19–CA–32872

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION, *AND* TEAMSTERS LOCAL 760

Feb. 8, 2012

DECISION AND ORDER

BY MEMBERS HAYES, FLYNN, AND BLOCK

On September 26, 2011, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent, Noel Canning, filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs, and has decided to affirm the judge's rulings, findings,[2] and con-

[1] No exceptions were filed to the judge's dismissal of the allegation that the Respondent, through Noel's comments that he would give employees what they wanted if only they would get out of the Union, independently violated Sec. 8(a)(1).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear pre-

clusions, to clarify his remedy,[3] and to adopt the recommended Order as modified and set forth in full below.[4]

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ponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions imply that the judge's rulings, findings and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] The Respondent shall make whole the unit employees for any losses attributable to its failure to execute the 2010 agreement in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondent shall also make whole its unit employees by making delinquent contributions to the Union Pension Trust Fund that have not been made since October 1, 2010, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Further, Respondent shall be required to reimburse its unit employees for any expenses ensuing from its failure to make the required fund contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts should be computed in the manner set forth in *Ogle Protection Service*, supra, with interest at the rate prescribed in *New Horizons for the Retarded*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. To the extent that an employee has made personal contributions to the Union Pension Trust Fund that have been accepted by the Fund in lieu of Respondent's delinquent contributions during the period of the delinquency, Re-

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Noel Canning, a division of the Noel Corporation, Yakima, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union in good faith by refusing to reduce to writing and to execute a collective-bargaining agreement reached with the Union, Teamsters Local 760, embodying the terms agreed to on December 8, 2010, and ratified by the employees on December 15, 2010, including payment of a retroactive bonus, thereby repudiating the parties' agreement.

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spondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that Respondent otherwise owes the Fund.

[1] We have modified the judge's recommended Order to include the appropriate remedial language for the violation found, and we have substituted a new notice to conform to the Order as modified. We note, specifically, that the modified Order does not require the Respondent to execute a contract with a 3-year term, but only to execute a contract embodying the agreement reached by the parties on December 8, 2010, and ratified by the employees on December 15, 2010, which agreement, as found by the judge, was for a 2-year term.

For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute a collective-bargaining agreement embodying the terms reached with the Union on December 8, 2010, and ratified by the employees on December 15, 2010, for all employees in the following appropriate bargaining unit:

> All production employees, including lead production, dock/warehouse employees, including lead dock/warehouse, quality control mixer, maintenance employees, mechanics, construction worker employees, utility employees; excluding all other employees, guards, office clerical employees, owners and supervisors as defined in the Act.

(b) Give retroactive effect, to October 1, 2010, to the provisions of the collective-bargaining agreement reached with the Union on December 8, 2010, and ratified by the employees on December 15, 2010, and apply the terms of that agreement for the agreed-upon 2-year duration, through September 30, 2012.

(c) Make all affected unit employees and the union pension trust whole, with interest, for any loss of wages or retroactive pension amounts.

(d) Make all affected unit employees whole, with interest, for the retroactive bonus (made to compensate employees for the length of time it took to get a

contract) agreed upon by the Respondent and the Union on December 8, 2010.

Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts due under the terms of this Order.

Within 14 days after service by the Region, post at its facility and place of business in Yakima, Washington, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 8, 2010.

Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 8, 2012

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Brian E. Hayes, Member

_____

Terence F. Flynn, Member

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Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with the Union in good faith by not reducing to writing and signing a collective-bargaining agreement reached with the Union, embodying the terms agreed to on December 8, 2010, and ratified by employees on December 15, 2010, including payment of a retroactive bonus, thereby repudiating the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL execute a collective-bargaining agreement embodying the terms reached with the Union on December 8, 2010, and ratified by employees on December 15, 2010, for all employees in the following appropriate bargaining unit:

All production employees, including lead production, dock/warehouse employees, including lead

dock/warehouse, quality control mixer, maintenance employees, mechanics, construction worker employees, utility employees; excluding all other employees, guards, office clerical employees, owners and supervisors as defined in the Act.

WE WILL give retroactive effect, to October 1, 2010, to the collective-bargaining agreement, and apply the terms of that agreement for the agreed-upon 2-year duration, through September 30, 2012.

WE WILL make our unit employees and the Union pension trust whole, with interest, for any loss of wages or retroactive pension amounts.

WE WILL make our unit employees whole, with interest, for the retroactive bonus.

NOEL CANNING, A DIVISION OF THE NOEL CORP.

Ryan Connolly, Esq., for the General Counsel.
Gary Lofland, Esq. (Lofland and Associates), of Yakima, Washington, for the Respondent.

Bob Koerner, Business Representative, Teamsters Local 760, of Yakima, Washington for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Yakima, Washington, on June 21 and 22, 2011. The charge was filed by Teamsters Local 760 (the Union) on December 15, 2010, and an amended charge was filed by the Union on February 7, 2011.

Thereafter, on March 31, 2011, the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Noel Canning, a Division of the Noel Corporation (the Respondent) of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (Act). The Respondent, in its answer to the complaint, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel and counsel for the Respondent. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Washington state corporation, maintains an office and place of business in Yakima, Washington, where it is engaged in the business of bottling and distributing Pepsi-Cola products. In the course and conduct of its business operations the Respondent annually derives gross revenues in excess of $500,000, and annually purchases and receives at its Yakima, Washington facility goods, products, and materials valued in excess of $50,000 directly from points outside the State of Washington. It is admitted and I find that the Respondent is, and at all material times has been, an employer engaged in commerce

within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Union is and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1) of the Act by certain statements made during the course of bargaining, and whether the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to execute and enter into a collective-bargaining agreement verbally agreed to by the parties during negotiations.

B. Facts

The parties had maintained a long-standing collective-bargaining relationship over successive collective-bargaining agreements. The prior collective-bargaining agreement extended from May 1, 2007, to April 30, 2010.[1] The collective bargaining unit is described as follows:

> All production employees, including lead production, dock/warehouse employees, including lead dock/warehouse, quality control mixer, maintenance

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[1] All dates or time periods hereinafter are within 2010 unless otherwise specified.

employees, mechanics, construction worker employees, utility employees; excluding all other employees, guards, office clerical employees, owners and supervisors as defined in the Act.

The current set of negotiations commenced on June 26. Negotiations took place on June 26, July 7, August 19, October 26, November 15, and December 8. The complaint alleges and the Respondent denies that the parties reached agreement on a contract during the December 8 bargaining session.

All the negotiations took place at the Union's premises. During the course of bargaining, the chief negotiator for the Union was Business Representative Bob Koerner. He was accompanied by the shop steward, Eddie Ford, and union member Matt Urlacher; however, during the December 8 session, Ford, who had sustained an injury, was replaced by union member Mark Weber. The Respondent was represented by Roger Noel, the Respondent's owner, Justin Noel, vice-president, Sam Brackney, plant manager, Larry Estes, chief financial officer, vice-president, and secretary, and Cindi Zimmerman, treasurer, although not all of these individuals were present at all the negotiating sessions. The record does not reflect whether there was a chief negotiator designated by the Respondent.

Business Representative Koerner took notes at each bargaining session. The notes were introduced into evidence. Koerner testified that Zimmerman and other members of the Respondent's negotiating team took notes at various sessions. Mark Weber

testified, infra, that he observed Zimmerman taking notes at the December 8 session.

The essential sticking points during negotiations involved wage and pension issues.[2] All other matters had been resolved. As testified to by Koerner and Weber, agreement was reached on December 8 that the Union would take back two wage/pension proposals to the unit employees for a secret-ballot vote; that the Union and Respondent would be bound by the outcome of the vote;[3] and that subject to the outcome of the vote, an agreement had been reached.

Koerner testified that on December 8, after other proposals were discussed, the Union countered with a proposal of a 2 year agreement providing for a 45-cents-per-hour increase for each of the 2 years, with the employees to determine by vote how much of the wage increase they wanted to divert to the Union's pension plan; further, the Respondent would continue to fully pay for the employees' medical insurance through the Respondent's medical plan. And, in addition, the employees would receive a bonus of $485

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[2] During negotiations, the Respondent and Union agreed to permit the employees to decide whether to remain with the Union's pension trust or to forego the Union's pension trust in favor of the Respondent's pension plan. A vote was taken, apparently sometime between the October 26 and November 15 bargaining sessions, and the employees voted to remain with the Union's pension trust.

[3] According to Koerner, the Union was to remain neutral prior to the vote and not advocate its position.

($380 after taxes) to compensate them for the length of time it had taken to reach a successor agreement.

Koerner testified that the Respondent countered with 40 cents per hour for each year, also with the foregoing understandings regarding the bonus and medical insurance. Although the Union was agreeable to the Respondent's counter-proposal, the Respondent believed the employees would be better off and would be putting more money in their pockets if they accepted an earlier offer proposed by the Respondent. This offer provided that the employees be required to contribute to a portion of their medical insurance; that for the first year of the contract they would receive a wage increase of 78 cents per hour, and an additional 12 cents per hour for the Union's pension trust; and that for the second year of the contract they would receive a wage increase of 33 cents per hour, with no additional amount for the Union's pension trust.

Koerner then proposed that the employees vote on each of the alternative proposals as "A" and "B" proposals. This was agreeable to the Respondent. Koerner agreed the Union would remain neutral and would not state a preference for either proposal. It was further understood and agreed that whichever proposal was selected by the employees, the bonus of $485 ($380 after taxes) would remain the same. The December 8 meeting ended, according to Koerner, when the parties shook hands and Koerner and Zimmerman agreed that Zimmerman would forward to him an email setting forth the understanding they had reached.

Weber, a current employee, has worked for the Respondent for 32 years. As noted, he was substituting for Shop Steward Ford at the December 8 session, the first bargaining session he had attended. Weber testified he "was there as a witness just to take down notes basically and then go back to the Plant and tell everybody how it had gone." Weber testified that when an agreement had been reached at that session he wrote down what had been agreed to and went over the items "point by point" with Zimmerman "right at the very end to make sure that I had everything correct in my mind about the two proposals I was going to take back." He explained this to the group, namely, that he had to make sure he had everything right, and reiterated to the group what had been agreed upon. Weber testified that Zimmerman "agreed with everything" step by step, stating "that's correct" as Weber reviewed from his notes each component of the "final two proposals that the Company and Bob [Koerner] had ironed out to take back to the employees for them to decide which of either they wanted to do and accept or not."

Weber further testified that after he got Zimmerman's confirmation that he "had everything down correctly," Roger Noel said he (Noel) was confused about whether the starting date of the new contract would be October 1 or November 1. Both Weber and Zimmerman simultaneously said "October 1," and Noel said, "then let's do it." And, according to Weber, "that was the end . . . we were done." Plant Manager Brackney nodded in agreement, and no one voiced any objections to the agreed upon terms as reiterated by

Weber and confirmed by Zimmerman. CFO Estes said, "[W]ell, write it up and get it sent over." Weber thanked everyone for letting him be a part of the process, and was the first to leave.

Weber's notes of the agreement, introduced into evidence, include the following: "Oct. 1, 2 year contract, Negotiations begin in September after Labor Day." The latter reference, according to Weber, concerns the next set of negotiations for the succeeding contract beginning in 2012. In this regard, Weber testified he asked Zimmerman whether the parties could begin the next set of negotiations while the contract was still in effect in order to avoid the instant awkward situation of beginning negotiations after the expiration of the contract. Zimmerman said, according to Weber, that we could start negotiations "right after Labor Day and by October 1st [2012] we could have a new contract ready to go and so we wouldn't be in this same boat again."

During the course of negotiations, according to Weber, Roger Noel twice "threw up his hands and said if you just get out of the Union, I'll give you anything you want." On one occasion Brackney, and perhaps others on the Respondent's negotiating team, said to Noel, "you can't say that," and Noel said, "I know I can't say that—this guy—pointing at Bob Koerner there—he said this guy will slap a lawsuit on me . . . something to that regard." On the second occasion, according to Weber, Brackney again

told Noel he couldn't say that, and Noel replied, "oh, I know that—I didn't mean it."[4]

Although there is some minor variance in the testimony of Koerner and Weber,[5] their testimony is consistent regarding the terms of the agreement and how it was to be voted on by the unit employees; and the notes they each took are consistent with this understanding.

On the following workday morning, December 9, in the lunchroom, in the presence of Plant Manager Brackney, Weber was explaining the terms of the two proposals to the employees at work. The employees, according to Weber, very much liked the "40–40" proposal as it came to be known. At some point that morning, Weber and Brackney agreed that they were both very happy that "it was all over" because the employees had been without a contract for quite some time. Brackney said, "You guys got a good deal." Weber agreed.

Later that day, according to Weber, he and Brackney talked about the "retro check pool"—the employ-

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[4] Koerner also testified that Brackney cautioned Noel about making these statements; however, on each occasion Noel simply responded, "I know." Unlike Weber, Koerner did not testify that Noel said he didn't mean it. The Respondent's witnesses testified that Noel stated something to the effect that the employees would be better off without the Union.

[5] For example, Koerner testified that Zimmerman recounted the terms of the agreement to Weber, whereas Weber testified that he recounted each term of the agreement to Zimmerman who replied, "that's correct."

ees would each put in $10 and the highest poker hand, derived from the check numbers on the retroactive checks to be paid to the employees to compensate them for the lost wages during the course of bargaining, would win the pool.

Apparently on the same day, Weber learned from Koerner that Roger Noel was changing his mind regarding the agreement. On that day Weber went around the plant telling employees that Roger Noel was backing off on the agreement. While he was talking with two employees, Brackney happened to come by and Weber reviewed the terms of the "40-40" proposal with the three of them. Weber said to Brackney, "You remember now Sam when I asked Cindi [Zimmerman]—I have to get this all right and everything and Sam completed my sentence for me. He said yes, you had to get it all right because you had to take it back to the guys the next day and be able to tell them what it was." Weber said that Roger Noel was now changing his mind, and Brackney said he did not know why Roger Noel would change his mind.

As noted above, Koerner testified that at the conclusion of the December 8 negotiating session, he asked Zimmerman to email to him the agreement they had just reached, and shook hands with each member of the Respondent's negotiating team. He also asked if he could use the Respondent's conference room to conduct the vote of the unit members. It was agreed that the room would be available to the Union for the

vote. Koerner's notes of the session state, inter alia, "Company will send typed version of (TA)."[6]

On the following day, December 9, Zimmerman sent Koerner an email entitled "Proposal," which differed significantly from the terms of the Union's preference set forth above: the 40-cent-per-hour increase for each of the 2 years of the agreement remained the same, but for each of the 2 years the "Pension contribution [was] not to exceed $.10 of the $.40." Nothing was said about the Respondent's alternative preference.

On December 10, in the morning, Koerner sent Zimmerman an email stating that the attachment to the email "shows what was Tentatively Agreed on December 9,[7] (sic) 2010. We need get this resolved prior to Wednesday. Mark [Weber] and Matt [Urlacher] have been explaining to the other employees the proposals." The attachment to the email sets forth the Union's understanding that "The wage pension diversion for each year was proposed as $.40 per hour with the employees diverting whatever portion to pension which would be voted by the group."

On the morning of December 10, Koerner posted a "Notice" at the Respondent's premises to "All Bar-

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[6] Koerner's testimony is not inconsistent with that of Weber regarding who would send the typed version of the agreement to whom, as Weber had left the meeting before its conclusion; it is probable that both versions are correct.

[7] This date is obviously incorrect as no further negotiations took place after December 8.

gaining Unit Members" announcing a "Vote for Contract" on Wednesday December 15, 2010, at the Respondent's "Front Meeting Room."

On the evening of December 10, Koerner spoke by telephone with Roger Noel; Zimmerman and Estes were also listening on a speakerphone. It was a confrontational conversation. Koerner told Noel the Respondent's foregoing email proposal was not what was agreed to, and that the $.10 pension amount had never even been discussed at the table. Noel, according to Koerner, simply replied that was the amount he was going to allow the employees to put in the pension trust. Noel also said, according to Koerner, "that it [the agreement] wasn't in writing and it was his company and he had the right to make the decisions." Koerner disagreed, saying it was not Noel's right to renege on the tentative agreement, and that the Union intended to go ahead with the ratification vote as agreed upon.[8]

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[8] The Respondent points out in its brief some rather confusing language contained in Koerner's Board affidavit, as follows: "I told Roger [Noel] that I was voting the contract on Wednesday and that I would vote the contract that we TA'd during the December 8 meeting noting (sic) different from that TA." (Emphasis supplied.) The Respondent maintains that this language should be interpreted to mean that Koerner intended to have the employees vote on something "different" than what he believed had been agreed upon on December 8. Koerner, when questioned about this, believed the language in his affidavit was correct, and that the "difference" between what was TA'd and voted upon was simply a matter of arithmetic. Thus, he explained the notes he took of the agreement on December 8, state, regarding the retroactive bonus,

The ratification vote was conducted on December 15, as scheduled. The unit employees overwhelmingly approved the "40–40" proposal by a vote of 37 to 2, voting to divert the total amount of the wage increase into the pension trust. Immediately after the vote Koerner walked across the street from the plant meeting room to the corporate offices, and showed the tally of ballots to Roger Noel and Brackney. Noel wadded up the tally of ballots and made some "rude comment" as he threw it back at Koerner.

On the following day Koerner received two letters from Roger Noel. One stating, inter alia, "It is not appropriate to vote an offer that was not made by the employer," and further stating that the parties were at impasse. The second letter advised Koerner to refer all further communications in writing to Respondent's attorney.

Cynthia Zimmerman, Respondent's treasurer, testified that during the 2½ hour December 8 negotiating session there was at first some initial confusion over the cost to employees should they contribute to the medical plan, as proposed by the Respondent.

"Retro 173.3 x 7 months [x 40 cents per hour]." This translates to $380 after taxes, a fixed amount on which the parties had agreed and which was a component of either alternative proposal. While Koerner so testified, I believe it is more likely that the quoted language also confused Koerner, and that the affidavit simply contained a spelling error. That is, it should state, ". . . nothing different from TA" rather than "noting different from TA." In either event, there is no showing that the employees voted on anything different from what had been agreed to on December 8.

Then, according to Zimmerman the parties "kind of talked back and forth and kind of reached what might've been common ground. Then there was (sic) still some issues to work out. Roger [Noel] was tired, we were all confused."[9] Then Mark Weber asked Zimmerman some "questions," as follows:

> He went through the 40 cents an hour and whether or not the employees could determine how much went into the pension. Then we went over the second proposal, which was a larger amount of money per hour and they [the employees] contributed to the medical expense.

In response to Weber's questions, Zimmerman simply replied, "Yes that's what we have been talking about," but she did not acknowledge to Weber that an agreement had been reached. After Weber left, according to Zimmerman, "We were talking about this and that. Then the meeting just kind of ended" and "We said we would go back and write up our offer. When we left, we all shook hands and Bob said, 'Put it in writing. We said okay.'" According to Zimmerman—and also according to Brackney and Estes—only Roger Noel had the authority to say yes or no on behalf of the Respondent, and Noel never said during the meeting

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[9] Zimmerman was not asked to elaborate and did not elaborate. She was not asked to explain and did not explain the parameters of the "common ground" that was reached regarding the parties' respective preferences; or what "issues to work out" remained to be resolved; or who were "confused" and what they were confused about after the initial confusion over the medical plan had been resolved.

anything to the effect that, "Yes, I agree to the proposal that employees will be able to determine the amount of wage increases that will be allocated to pension."

Koerner testified that Zimmerman took notes during the bargaining sessions and his affidavit specifies that he observed Zimmerman taking notes at the December 8 session; and Weber testified that he too observed Zimmerman taking notes during the December 8 session. However, Zimmerman neither produced any notes nor testified that she did not take notes during the December 8 session or any of the earlier sessions, nor otherwise explained the absence of her notes.

The Respondent called Matthew Urlacher as a witness. Urlacher, a member of the bargaining unit and of the Union's bargaining team, has worked for the Respondent for 41 years. Urlacher testified that at the December 8 meeting both sides "got a little loud . . . [and] disagreed quite a bit on . . . what they believe is better." After a break and the parties went back to the table, "It was calmer. I don't know exactly what they were talking about when they got back. Roger and Bob were mainly talking back and forth." Urlacher was not asked what had been agreed upon during the December 8 session, what the respective positions of the parties were, or what issues remained to be resolved. Although he voted in the ratification vote, he was not asked whether the ratification vote reflected what had been agreed to on December 8.

Plant Manager Sam Brackney testified that shortly before the December 8 meeting ended, Weber asked questions about "some of the things" that had been discussed, and he wrote it down. Zimmerman did not tell Weber that the company had "agreed" the employees could choose the amount of the wage increase that would be diverted to the pension plan: "She did not say agreed. She said we have discussed it."

The meeting ended with the understanding that the Respondent would "write up a proposal and present it to [the Union]."

Regarding his various conversations with Weber about the matter, Brackney testified that the following morning he did discuss with Weber what went on at the meeting, and "believes" he did say to Weber, "I'm glad this is almost over." Brackney did not testify about what he discussed with Weber that morning, and maintains the remark that he made referred not to any agreement reached at the meeting, but rather to the fact that he knew the Respondent was going to present to the Union a new proposal, "and I knew what the offer was going to be from the company and I knew the employees would accept that offer." In this regard, Brackney testified that he had been made aware of this new offer by an email sent to him by Zimmerman. However, when the email from Zimmerman was produced by the Respondent, upon the General Counsel's demand at the hearing, showing that the email from Zimmerman was a copy of the email Zimmerman had sent to Koerner at 4:02 PM and forwarded to Brackney at 4:11 PM, Brackney recanted his prior testimony,

said he had been mistaken, and that he had learned about the proposal during a face-to-face conversation with Zimmerman that morning prior to his conversation with Weber. Zimmerman told him what the proposal was going to be and asked him if he thought the employees would accept it, and Brackney told her, "Yeah, I'm pretty sure they will accept it." Brackney did not testify why he thought the Union would accept such an offer.

Brackney was not asked about his later conversation with Weber that afternoon regarding the "retro check pool," as testified to by Weber, supra.

The following day, according to Brackney, he and Weber did have a further conversation about the matter. They were talking about what Weber "believed" the December 8 offer was, and what Brackney "knew" the new offer was. Weber thought the "40–40" offer gave the employees the choice of determining how much went into the pension trust fund. Brackney simply told Weber that was not the Respondent's offer. However, he did not tell Weber what the Respondent's new offer was because he "wasn't 100% sure, but I had not seen it, but I knew what it was." However, as noted, Brackney had earlier testified that he had in fact seen the new offer the day before and "knew the employees would accept that offer."

Roger Noel testified that during the December 8 negotiations, "We talked about wages, we talked about pension, what's conversion, all kinds of things." It appeared to Noel that Koerner was trying to "push" the Respondent for a "commitment." Noel did not

testify regarding the details or even the nature of the "commitment," but merely testified the Respondent was not ready to make any kind of commitment to the Union. Noel did not testify about Weber's questions to Zimmerman or Zimmerman's responses to Weber. At the end of the meeting, according to Noel, "we said we'd get back to him [Koerner]. We'd give him a written proposal." During the phone conversation with Koerner on December 10, Noel said he wanted to continue negotiations with Koerner, but Koerner refused to negotiate further.

CFO Larry Estes testified that, "We turned most of it [the negotiations] over to Cindy [Zimmerman.]" Estes did not testify that the December 8 meeting was chaotic or disorganized or that he didn't know or understand what was being negotiated during the course of the meeting. Estes did not testify regarding Weber's questions to Zimmerman or Zimmerman's responses to Weber. At the end of the meeting, Koerner said, "you guys go back and write something up and get it back to me." Estes said. "yes, we will."

On January 13, 2011, the Union sent copies of the new collective-bargaining agreement,[10] executed by John Parks, secretary-treasurer of the Union, reflecting the terms ratified by the unit members as discussed above. Koerner also hand delivered an execu-

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[10] While there is no contention by the Respondent that the proffered contract is inaccurate in any respect, the contract language specifies that the contract extends from October 1, 2010, to September 30, 2013. This is apparently incorrect, as the parties had agreed upon a two-year term.

ted copy to the Respondent. To date the Respondent has refused to execute the contract or honor the terms of the new agreement, including the payment of the retroactive bonus to the employees.

Analysis and Conclusions

I found Koerner and Weber[11] to be highly credible witnesses, with their contemporaneous notes of the December 8 meeting reinforcing their mutually consistent testimony regarding the agreement reached at that meeting. In contrast, it is significant that none of the Respondent's witnesses either produced notes of the meeting or explained why no notes were available. Nor did Zimmerman contradict Weber's testimony that he observed her taking notes. I therefore conclude that Zimmerman did in fact take notes and that her notes would not support the Respondent's position that no agreement was reached.

The testimony of Noel, Zimmerman, Brackney, and Estes was abbreviated, conclusionary, nonspecific, and unconvincing. It is significant that none of these individuals stated what proposals were in fact made by either the Respondent or the Union during the Decem-

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[11] Weber, a long-time employee who was present for just that one December 8 meeting as a replacement for the union steward, has not been shown to harbor any bias. He was simply recruited to attend the meeting at the last minute, in place of the injured union steward, with the understanding that he would be a messenger and report back to the employees what had occurred during negotiations. He explained this role to the Respondent's representatives, and was very careful to insure the accuracy of the information he would relay to the employees at the plant.

ber 8 session. Nor did they deny Weber's very precise testimony in which he specifically quoted Noel. Thus, according to Weber's testimony, at the conclusion of the December 8 meeting, after the terms of the agreement had been reviewed and confirmed by Weber and Zimmerman, and after it had been further confirmed that the new contract would begin October 1, Noel finalized this understanding and meeting of the minds by concluding the substantive portion of the meeting with his comment, "then let's do it." As noted, Weber's recollection of this colloquy stands unrebutted, and I credit Weber.

Brackney's testimony regarding his various conversations with Weber on December 9 and 10 is also confusing. The scenario presented by Brackney regarding his discussion with Weber on the morning of December 9 is nonsensical and obviously contrived. According to Brackney, he told Weber he, too, was happy the matter was "almost over." Brackney claims he made this statement not because he was agreeing with Weber that an agreement had been reached, but rather because he knew that a new proposal (of which the Union had not yet been apprised, and which on its face was clearly inferior to the proposal the Union favored during negotiations) would nonetheless be accepted by the Union. Brackney's purported prescience in this regard defies credulity. Clearly, Brackney's testimony is false, and he made this statement to Weber because he and Weber were of the common understanding that a new contract had in fact been reached. I so find.

The Respondent maintains that because it strongly preferred its own pension plan over the Union's pension trust, or for other reasons, it would not have agreed to permit the employees to unilaterally determine how much of any wage increase would be diverted into the Union's pension trust. This contention is belied by the fact that on November 15 the Respondent made this very proposal. Thus, the Respondent's first wage and pension proposal, presented to the Union at the November 15 bargaining session, was a written proposal as follows: 33 cents per hour for each year of a 2-year contract, with the additional component that "Employees to decide breakdown between wages and pension." Accordingly, I find no merit to the Respondent's contention.

Furthermore, given the fact that the Respondent did initiate such a written proposal on November 15, and the Union countered at the next negotiating session on December 8 with 45 cents per year rather than 33 cents, as Koerner testified, supra, it is reasonable to assume, again as Koerner testified, that it was the Respondent that proposed a compromise figure of 40 cents per hour to which the Union agreed. I so find.

The Respondent maintains that Washington State law precludes legal enforcement of verbal contractual agreements. Whatever the parameters of Washington State law regarding verbal contractual agreements, this matter is not subject to state law. Under Federal law, it is clear that the verbal agreement reached here is valid and enforceable. Once a verbal agreement is reached by the parties, they are obligat-

ed to abide by the terms of the agreement even though those terms have not been reduced to writing. *H.J. Heinz v. NLRB*, 311 U.S. 514 (1941); *Young Women's Christian Association (YWCA)*, 349 NLRB 762, 771 (2007); *Sunrise Nursing Home, Inc.*, 325 NLRB 380, 389 (1998).

On the basis of the foregoing, I find that the December 8 bargaining session concluded with a verbal agreement and meeting of the minds on all substantive issues of a collective-bargaining agreement, and, in addition, on the amount of the retroactive bonus for the unit employees. The agreement provided for the Union to conduct a vote of the unit employees to decide which wage/pension option to adopt, and for the Union and Respondent to be bound by the results of the vote. The vote was conducted on December 15; the unit employees voted to accept the "40–40" option which included the component that the employees would determine how much of the 40 cents to divert to the Union's pension trust; and the Union subsequently prepared, executed, and forwarded the collective-bargaining agreement, reflecting the terms of the ratification vote, to the Respondent. To date the Respondent has failed and refused to pay the employees the agreed-upon retroactive bonus, or to execute and abide by the terms of the contract. By such conduct I find the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act as alleged. *Young Women's Christian Association (YWCA)*, supra.

The complaint also alleges that the statements by Roger Noel during the December 8 bargaining session

violate Section 8(a)(1) of the Act. I credit Weber, who testified that during the negotiating session Noel twice said, apparently to Urlacher and Weber who were the only employees present, "If you just get out of the Union, I'll give you anything you want." On the first occasion Noel acknowledged that such a statement might be unlawful, and on the second occasion he stated he didn't mean it. I conclude that Noel's timely and specific retraction of his comments is sufficient to warrant a dismissal of this allegation of the complaint. *Siemens Building Technologies, Inc.*, 345 NLRB 1108, 1115 (2005). Accordingly, this allegation of the complaint is dismissed.

Conclusions of Law and Recommendations

1. The Respondent Noel Canning, A Division of the Noel Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

4. The Respondent has not violated Section 8(a)(1) of the Act as found herein.

The Remedy

Having found that the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act, I recommend that it cease and desist therefrom and from in any other like or related manner interfering with, re-

straining, or coercing its employees in the exercise of their rights under Section 7 of the Act, and that it take certain affirmative action designed to remedy the unfair labor practices and to effectuate the policies of the Act. I shall recommend that the Respondent forthwith sign the collective-bargaining agreement embodying the terms of the agreement between it and the Union as found herein, and give effect to such agreement retroactive to October 1, 2010. I shall further recommend that the Respondent make whole its employees and the union pension trust fund, with interest, for the amounts that would have would have been paid into the trust fund from October 1, 2010. Further, I shall recommend that the Respondent pay to its employees the agreed-upon amount the employees would have received as a retroactive bonus, with interest. Finally, I shall recommend the posting of an appropriate notice, attached hereto as "Appendix."

ORDER[12]

The Respondent Noel Canning, A Division of the Noel Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union in good faith by refusing to execute the collective-

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[12] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

bargaining agreement presented to the Respondent by the Union to become effective October 1, 2010. The Union is the exclusive collective-bargaining representative of employees in the unit described below:

> All production employees, including lead production, dock/warehouse employees, including lead dock/warehouse, quality control mixer, maintenance employees, mechanics, construction worker employees, utility employees; excluding all other employees, guards, office clerical employees, owners and supervisors as defined in the Act.

(b) Failing and refusing to make its employee and the union pension trust whole for any loss of wages or retroactive pension amounts.

(c) Failing and refusing to pay to its unit employees the agreed upon retroactive bonus reached during negotiations for a new contract.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act.

(a) Forthwith sign the collective-bargaining agreement with the Union dated October 1, 2010.

(b) On the execution of the agreement, give effect to the provision of the agreement retroactive to October 1, 2010, and make its employee and the union pension trust whole, with interest, for any loss of wages or retroactive pension amounts.

(c) Make its unit employees whole, with interest, for the amount they would have received as a retroactive bonus as agreed upon by the Respondent and Union during negotiations.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the monetary amounts specified herein.

(e) Within 14 days after service by the Region, post at its facility and place of business in Yakima, Washington, copies of the attached notice marked "Appendix."[13] Copies of the notice on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

---

[13] If this Order is enforced by a judgment of the United States Court of Appeals, the wording in the notice reading, "Posted by Order of the National Labor Relations Board," shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. September 26, 2011

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain with Teamsters Local 760 as the exclusive representative of the em-

ployees in the following appropriate unit concerning terms and conditions of employment:

> All production employees, including lead production, dock/warehouse employees, including lead dock/warehouse, quality control mixer, maintenance employees, mechanics, construction worker employees, utility employees; excluding all other employees, guards, office clerical employees, owners and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, forthwith sign the collective-bargaining agreement with the Union dated October 1, 2010.

WE WILL, on the execution of the agreement, give effect to the provision of the agreement retroactive to October 1, 2010, and make our employees and the union pension trust fund whole, with interest, for any loss of wages or retroactive pension amounts.

WE WILL make our unit employees whole, with interest, for the amount they would have received as a retroactive bonus as agreed upon during negotiations.

NOEL CANNING, A DIVISION OF THE NOEL CORP.

APPENDIX C

157 Congressional Record S8783-S8784 (daily ed. Dec. 17, 2011) reads in pertinent part:

* * * * *

ORDERS FOR TUESDAY, DECEMBER 20, 2011 THROUGH MONDAY, JANUARY 23, 2012

Mr. WYDEN. Madam President, I ask unanimous consent that when the Senate completes its business today, it adjourn and convene for pro forma sessions only, with no business conducted on the following dates and times, and that following each pro forma session the Senate adjourn until the following pro forma session: Tuesday, December 20, at 11 a.m.; Friday, December 23, at 9:30 a.m.; Tuesday, December 27, at 12 p.m.; Friday, December 30, at 11 a.m.; and that the second session of the 112th Congress convene on Tuesday, January 3, at 12 p.m. for a pro forma session only, with no business conducted, and that following the pro forma session the Senate adjourn and convene for pro forma sessions only, with no business conducted on the following dates and times, and that following each pro forma session the Senate adjourn until the following pro forma session: Friday, January 6, at 11 a.m.; Tuesday, January 10, at 11 a.m.; Friday, January 13, at 12 p.m.; Tuesday, January 17, at 10:15 a.m.; Friday, January 20, at 2 p.m.; and that the Senate adjourn on Friday, January 20, until 2 p.m. on Monday, January 23; that following the prayer and pledge, the Journal of proceedings be approved to date, the morning hour be deemed expired, and the time for the two leaders be reserved for their use later in the day; further, that

following any leader remarks the Senate be in a period of morning business until 4 p.m., with Senators permitted to speak therein for up to 10 minutes each, and that following morning business, the Senate proceed to executive session under the previous order.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. WYDEN. The next rollcall vote will be on Monday, January 23, at 5:30 p.m. on confirmation of the Gerrard nomination.

ADJOURNMENT UNTIL TUESDAY, DECEMBER 20, 2011, AT 11 A.M.

Mr. WYDEN. If there is no further business to come before the Senate, I ask unanimous consent that the Senate stand adjourned under the previous order.

There being no objection, the Senate, at 3:33 p.m., adjourned until Tuesday, December 20, 2011, at 11 a.m.

* * * * *

APPENDIX D

1. The United States Constitution provides in pertinent part:

Art. I:

* * * * *

§ 3:

Cl. 2:

> and if Vacancies [in the Senate] happen by Resignation or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

* * * * *

Cl. 5:

> The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

* * * * *

§ 4, Cl. 2:

> The Congress shall assemble at least once in every Year and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

* * * * *

§ 5, Cl. 4:

> Neither House, during the Session of the Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

* * * * *

§ 7, Cl. 2:

> If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

* * * * *

Art. II, § 3:

> [The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

* * * * *

Amend. XX, § 2:

> The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

2. 29 U.S.C. 153 provides, in pertinent part:

National Labor Relations Board

(a) Creation, composition, appointment, and tenure; Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. § 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to

delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

* * * * *

3. 29 U.S.C. 160 provides, in pertinent part:

Prevention of unfair labor practices

* * * * *

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record con-

sidered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have

been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

REPLY BRIEF

Supreme Court, U.S.
FILED
JUN 6 - 2013
OFFICE OF THE CLERK

No. 12-1281

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NOEL CANNING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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In the Supreme Court of the United States

No. 12-1281

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NOEL CANNING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The court of appeals held that the appointments of three members of the National Labor Relations Board by the President were inconsistent with the Recess Appointments Clause (U.S. Const. Art. II, § 2, Cl. 3) on the grounds that those appointments were made during an intra-session recess of the Senate and that they filled vacancies that had not first arisen during that same recess. Pet. App. 18a-35a, 35a-52a. All of the parties to this case—and all of the amici curiae—agree that this Court should grant certiorari to review that decision. See Noel Canning Br. in Resp. 9; Int'l Bhd. of Teamsters Br. in Resp. 1, 11; Sen. Republican Leader Mitch McConnell and 44 Other Senators Amicus Br. 2; Coalition for a Democratic Workplace Amicus Br. 6; Constitutional Accountability Ctr. Amicus Br. 4; Prof. Victor Williams Amicus Br. 2. The petition for a writ of certiorari should be granted.

A. The Court Should Review And Reverse Both Grounds Of The Court Of Appeals' Decision Invalidating The Appointments At Issue

1. As the court of appeals acknowledged (Pet. App. 30a, 41a-42a), both grounds of its decision departed from the prior decisions of other federal courts of appeals. See *Evans* v. *Stephens*, 387 F.3d 1220, 1224-1227 (11th Cir. 2004) (en banc), cert. denied, 544 U.S. 942 (2005); *United States* v. *Woodley*, 751 F.2d 1008, 1012-1013 (9th Cir. 1985) (en banc), cert. denied, 475 U.S. 1048 (1986); *United States* v. *Allocco*, 305 F.2d 704, 709-715 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963). After the petition for certiorari was filed, the Third Circuit issued a decision that, while rejecting several aspects of the D.C. Circuit's reasoning, agreed with it about the invalidity of intra-session recess appointments. See *NLRB* v. *New Vista Nursing & Rehab.*, Nos. 11-3440, 12-1027, 12-1936, 2013 WL 2099742 (May 16, 2013). That only reinforces the need for this Court's review of the decision below.

2. Respondent Noel Canning defends both of the grounds on which the court of appeals invalidated the appointments at issue in this case. Br. in Resp. 11-22, 22-29. While Noel Canning does not dispute that the court of appeals' reasoning would have invalidated hundreds of previous recess appointments, it does attempt to minimize the deep historical roots of the appointment practices that the court of appeals held to be unconstitutional. Noel Canning's efforts in that regard lack merit.

a. For instance, with respect to the question of intra-session recess appointments, Noel Canning attempts to dismiss the significance of President Andrew Johnson's 1867 appointments on the ground that Johnson was battling Republicans in Congress at the time and "never attempted to justify the[] legality" of his appointments.

Noel Canning Br. in Resp. 11 n.6. But the political battle—which was largely about whether Senate confirmation was required for *removal* from office—was immaterial to the intra-session recess appointments.[1] Nearly all of Johnson's intra-session recess appointees received the Senate's advice and consent after it resumed its session.[2] And there could have been no doubt that the validity of their interim appointments required the application of the Recess Appointments Clause to an intra-session recess. Indeed, the Court of Claims addressed that question with respect to one Johnson appointee who was ultimately not confirmed. See *Gould* v. *United States*, 19 Ct. Cl. 593, 595-596 (1884) (expressing "no doubt" that an appointment as a paymaster in the Army "could be and was legally filled by appointment of the President alone" during the Senate's four-month intra-session recess).

Noel Canning suggests (Br. in Resp. 13-14) that the general absence of intra-session recess appointments "until the 1920s (or really the 1940s)" indicates that the President was assumed not to have such a power. In fact, it simply reflects that 1867, 1868, 1921, and 1929 were the only years before the 1940s that the Senate took lengthy intra-session recesses at times other than the period around Christmas and New Year's Day. See Pet. 22; S. Pub. 112-12, *Official Congressional Directo-*

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[1] Johnson was, of course, not convicted in his impeachment trial, and this Court later sustained Johnson's view of his removal power. See *Myers* v. *United States*, 272 U.S. 52, 166-167, 175-176 (1926).

[2] Compare Henry B. Hogue, Cong. Research Serv., *Memorandum re: Intrasession Recess Appointments* 5 (Apr. 23, 2004) (listing 14 of Johnson's intra-session recess appointees), with S. Exec. J., 40th Cong., 1st Sess. 793-794, 818, 847, 856-857 (1867) (reporting advice and consent to all of those nominees except James Lutterill).

ry, 112th Congress 522-528 (2011), www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf. And the Presidents' refusal, in practice, to use every lengthy intra-session recess—or, for that matter, every *inter*-session recess—to fill every extant vacancy does not demonstrate an assumed lack of constitutional power. Instead, it shows that Presidents generally have good reasons to seek Senate confirmation for their appointments. See Pet. 22. It therefore belies the court of appeals' declaration that a highly restrictive interpretation is necessary to prevent the Recess Appointments Clause from "swallow[ing] the 'general' route of advice and consent." Pet. App. 26a.

Finally, it is undisputed that, in addition to Johnson's 1867 appointments, the Executive has consistently claimed the power to make intra-session recess appointments since 1921. See Pet. 17. A consistent practice of even 90 years deserves more regard than the court of appeals allowed. See, *e.g.*, *The Pocket Veto Case*, 279 U.S. 655, 689-690 (1929) (treating a "practice of at least twenty years duration" as being "a consideration of great weight in a proper interpretation of constitutional provisions").

b. With respect to the question of when a vacancy must first arise for purposes of the Recess Appointments Clause, the petition acknowledged that there was "debate" about the correct interpretation in the first three decades of practice under the Constitution. Pet. 24-25 & n.9. In addition to relying on the figures who took its side in that debate, Noel Canning contends, implausibly, that President Washington effectively made a mistake of fact when he appointed a United States Attorney to a position that had been vacant for nearly four years and when he appointed an Engraver of the

Mint. Br. in Resp. 26. But even setting those appointments aside, Noel Canning cannot dispute that the appointments in this case are consistent with Executive interpretation and practice going back at least 190 years to the administration of President James Monroe. See Pet. 24 (discussing the 1823 opinion of Attorney General William Wirt, 1 Op. Att'y Gen. 631).

3. In any event, Noel Canning's invocations of history—like those in the government's petition about historical practice and the original understanding of the constitutional text—go principally to the merits of the questions presented. They do not alter the existence of two circuit splits. See Pet. App. 30a, 41a-42a. Nor do they detract from the broad consensus that the decision below warrants this Court's review. See p. 1, *supra*.

B. The Court Should Not Address An Alternative Ground That Has Been Addressed By No Court

1. Although it does not oppose certiorari, Noel Canning contends (Br. in Resp. 9-10) that the Court should expand the scope of the questions presented to encompass whether the Senate's pro-forma sessions prevented it from being in recess on January 4, 2012, for purposes of the Recess Appointments Clause. The effect of the Senate's pro-forma sessions on the length of its recess was the principal question addressed by the parties in the court of appeals, see Pet. 6-7, and it is assuredly important. But that question was not resolved by the court of appeals, and it has not yet been resolved by any court, though it might be a ground of decision in any of several cases that are currently pending in the courts of appeals.[3]

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[3] See, *e.g.*, *NLRB* v. *Enterprise Leasing Co. S.E., LLC*, No. 12-1514 (4th Cir. argued Mar. 22, 2013); *Kreisberg* v. *HealthBridge Mgmt.*,

Under the circumstances, the government would expect the Court to decline respondent's request to expand the questions presented, consistent with "the wise and settled general practice of this Court not to consider an issue in the first instance"—especially "when the new issue is a constitutional matter." *Turner* v. *Rogers*, 131 S. Ct. 2507, 2524-2525 (2011). As the Court often observes, it is "a court of final review and not first view," and it therefore does not ordinarily "decide in the first instance issues not decided below." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (citations omitted); see also, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (declining to consider a constitutional question on which the court of appeals "did not definitively rule").

Noel Canning suggests (Br. in Resp. 10) that the addition of the question would "maximize the Court's flexibility in resolving this dispute." But a decision from this Court affirming on the alternative ground involving pro-forma sessions would simply perpetuate the serious threats already posed by the D.C. Circuit's decision. As the petition explained, if the court of appeals' decision is not reversed, it will not just affect the appointments that the President made on January 4, 2012, but could also call into question many previous appointments (and possibly future appointments) to a wide range of federal agencies and offices. See Pet. 30 (noting that venue lies in the D.C. Circuit in virtually all civil actions seeking

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LLC, No. 12-4890 (2d Cir. argued May 15, 2013); *Big Ridge, Inc.* v. *NLRB*, Nos. 12-3120 and 12-3258 (7th Cir. argued May 31, 2013). As Noel Canning acknowledges (Br. in Resp. 8 n.4), the Third Circuit's decision in *New Vista Nursing & Rehabilitation*, *supra*, addressed an appointment that was made in an intra-session recess during which the Senate was not holding pro-forma sessions.

review of federal agency actions). Resolving this case on Noel Canning's proffered alternative ground would not eliminate the two circuit conflicts created by the decision below and would not remove the constitutional cloud that the court of appeals has placed over the acts of hundreds of past and present recess appointees.

2. Accordingly, the Court should grant certiorari on the two questions presented in the petition for a writ of certiorari. But it should not address the effect of pro-forma sessions of the Senate unless that question has become suitable for its review (which would presumably require at least a decision on that ground by a lower court).

If, however, the Court is inclined to use this case to decide what effect pro-forma sessions of the Senate have on the existence of a recess for purposes of the Recess Appointments Clause, it should add that question as part of any order granting certiorari. That would enable the parties and the amici curiae to be on notice that they should address it along with the two grounds that were actually resolved by the court of appeals. In that event, it would also be prudent for the Court to expand the word limits for the parties' merits briefs, to enable them to deal with all three constitutional questions.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

JUNE 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEF

Supreme Court, U.S.
FILED
MAY 23 2013
OFFICE OF THE CLERK

No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the District of Columbia Circuit

BRIEF OF THE COALITION FOR A DEMOCRATIC WORKPLACE AS *AMICUS CURIAE* IN SUPPORT OF CERTIORARI

MARK T. STANCIL
Counsel of Record
WILLIAM J. TRUNK
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
mstancil@robbinsrussell.com

Counsel for Amicus Curiae

Library of Congress

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BRIEF OF THE COALITION FOR A DEMOCRATIC WORKPLACE AS *AMICUS CURIAE* IN SUPPORT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*[1]

The Coalition for a Democratic Workplace ("CDW") comprises over 600 member organizations representing millions of employers nationwide. An important function of CDW is to provide a collective voice to its membership on issues of national concern to the business community. CDW regularly advocates for its members on a range of labor issues and files *amicus curiae* briefs in cases of particular importance to its members.

This is such a case. Because the vast majority of CDW's members are subject to the National Labor Relations Act ("NLRA"), CDW has an interest in ensuring that the National Labor Relations Board (the "Board") does not issue binding decisions affecting thousands upon thousands of employers without a lawfully constituted quorum.

The court of appeals correctly held that the Board lacked a quorum because three of its five members were unlawfully appointed without the Senate's constitutionally required advice and consent. But it

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[1] Counsel of record for all parties received timely notice of the *amicus curiae*'s intent to file this brief. S. Ct. Rule 37.2(a). The parties' letters of consent to the filing of this brief have been filed with the Clerk. Further, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission. See S. Ct. Rule 37.6.

is important that such constitutional barriers be respected on a national scale; not circuit-by-circuit. There is nothing to gain – and much to lose – by delaying review and allowing litigants to seek further lower-court rulings on an issue that indisputably warrants this Court's review. Accordingly, CDW has a substantial interest in whether this Court grants the petition.

STATEMENT

1. The Appointments Clause requires the President to obtain the advice and consent of the Senate before appointing high-ranking public officials. U.S. Const. art. II, § 2, cl. 2. This advice-and-consent requirement places an important constraint on the President's appointment power. The Framers understood that the Senate would be "an excellent check upon a spirit of favoritism in the President." The Federalist No. 76 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), at 513.

The Recess Appointments Clause immediately follows the Appointments Clause and allows the President "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. The recess-appointment power was intended as an "auxiliary method of appointment" in times of genuine necessity. The Federalist No. 67, *supra*, at 455. At the time of the Framing, Congress would often recess for six to nine months at a time, and the Framers understood that important vacancies could occur while the Senate was away. The President therefore was given the power to fill those vacancies "which it might be necessary for the public service to fill without delay." *Ibid.*

2. This case arises from the President's invocation of the Recess Appointments Clause to appoint three members to the Board on January 4, 2012, without the Senate's advice and consent.

Under the NLRA, the Board is to "consist of five . . . members, appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a). By statute, the Board must have three validly appointed members to have a quorum. *Id.* § 153(b). Without a quorum, the Board is powerless to act. *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2644-45 (2010).

On January 3, 2012, the first session of the 112th Congress came to a close. At that time, the commission of one of the Board's members – Craig Becker, a prior recess appointee – expired automatically. The resulting vacancy left the Board with only two members, and thus no quorum.

The next day, January 4, 2012, the President announced that he "refuse[d] to take 'no' for an answer" from Congress in connection with this and other vacancies. See Helene Cooper, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1. The President declared that he was relying on the recess-appointment power unilaterally to appoint Sharon Block, Terence Flynn, and Richard Griffin to the Board. *Ibid.*[2]

The Senate was regularly holding sessions at the time. Between December 17, 2011, and January 23, 2012, the Senate was convening "pro forma"[3] every

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[2] The President appointed Richard Cordray to the Consumer Financial Protection Bureau at the same time.

[3] "Pro forma," in congressional parlance, generally refers to a session of brief duration convened principally to comply with

three days to satisfy its constitutional obligation not to adjourn for more than three days without the House's consent. See U.S. Const. art. I, § 5, cl. 4 (Adjournments Clause). In fact, on January 3, 2012 – the day before the President issued the appointments – the Senate assembled in that fashion to commence the second session of the 112th Congress pursuant to the Twentieth Amendment. See 158 Cong. Rec. S1-01 (daily ed. Jan. 3, 2012).[4]

The Senate's December 17, 2011, scheduling order contemplated that there would be "no business conducted" at these sessions. 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011). But the Senate did conduct business during these sessions: On December 23, 2011, at the President's request, the Senate passed a bill extending the payroll tax cut for two months. *Id.* at S8789 (daily ed. Dec. 23, 2011).

On January 12, 2012, the Office of Legal Counsel released an opinion concluding that the President's recess appointments were proper. The opinion argued, in principal part, that the President has the unilateral power to judge the existence *vel non* of a "real and genuine recess." See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 1, 5 (2012) ("OLC Opinion"). Thus, not-

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the Adjournments Clause. "[T]he term pro forma describes the reason for holding the session, [but] does not distinguish the nature of the session itself . . . a pro forma session is not materially different from other Senate sessions." 158 Cong. Rec. S5954 (daily ed. Aug. 2, 2012) (CRS report).

[4] The Twentieth Amendment requires that "[t]he Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const. amend. XX, § 2.

withstanding the Senate's pro forma sessions, the President could "properly conclude that the Senate [was] unavailable" – and make recess appointments on that basis. *Id.* at 9.

3. On February 8, 2012, the newly constituted Board issued a decision adverse to Respondent Noel Canning. Noel Canning petitioned for review of that decision in the United States Court of Appeals for the D.C. Circuit. Noel Canning argued, among other things, that the President's January 4 appointments were unconstitutional because the Senate was not actually in recess when the President purported to exercise his recess-appointment power. Resp. C.A. Br. 29-36. Accordingly, Noel Canning explained, the Board lacked a quorum of validly appointed members and its order therefore lacked the force of law.

The court of appeals granted the petition and vacated the Board's order. Pet. App. 1a-55a. The court held that the January 4 appointments were unconstitutional for two reasons. *First*, a unanimous court held that the Recess Appointments Clause allows the President to make recess appointments only during the "inter-session" recess between two sessions of Congress.[5] *Second*, a two-judge majority further held that the Recess Appointments Clause extends only to those vacancies that actually "happen," or arise, during the recess in which appointments are to be made.

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[5] The Third Circuit recently joined the D.C. Circuit in holding that the Recess Appointments Clause does not countenance intra-session recess appointments. See *NLRB* v. *New Vista Nursing and Rehabilitation*, No. 11-3440, Slip at 101 (Mar. 19, 2013) (holding, *sua sponte*, that Member Becker's March 2010 intra-session recess appointment was unconstitutional).

Because the appointments failed on those grounds, the court of appeals did not squarely address the narrower (and equally dispositive) question whether the President may lawfully make intra-session recess appointments where, as here, the Senate is convening every three days in accordance with the Adjournments Clause.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the President violated the Constitution when he appointed Members Block, Flynn, and Griffin to the Board on January 4, 2012. That decision, however, is not the final word on this subject. This Court's review is necessary to establish a nationally uniform rule and to reject once and for all the government's misguided view of the Recess Appointments Clause.

In fact, this case is even more significant – and more deserving of immediate review – than the petition reflects. Even if the government were correct that the D.C. Circuit erred in its interpretation of the Recess Appointments Clause, the January 4 appointments are unconstitutional for a more fundamental reason: Because the Senate did not adjourn for more than three days under the Adjournments Clause, the Senate was not in *any* sort of recess – intra-session or otherwise – on January 4, 2012. That is, regardless of what kind of break in Senate proceedings constitutes "the Recess" under the Recess Appointments Clause, it cannot possibly be one for which the Senate would not even require the House's consent.

The questions presented by the government are conspicuously under-inclusive in this regard. Indeed, although it is not apparent from the petition, the January 4 appointments were quite literally

unprecedented. To our knowledge, no President in history has attempted an intra-session recess appointment during such a brief adjournment. This abrupt departure from historical practice conflicts with the purpose of the Recess Appointments Clause and is a startling encroachment on the Senate's advice-and-consent function.

What is more, the government has defended these appointments on the basis that the President has sole discretion to judge whether the Senate is "functionally" in recess – *even if it is regularly holding sessions*. This functional-recess approach is untenable. Not only is it atextual, it is also dangerously unworkable and would afford the President virtually unchecked authority to define the scope of his own recess-appointment power. The government's approach violates core constitutional prerogatives of the Senate – our system of checks and balances is undermined when one branch claims the authority to define its own exceptions to another branch's oversight. In any event, the government's argument fails on its own terms, because pro forma sessions are "real" sessions in which the Senate can (and does) perform legislative functions.

The D.C. Circuit correctly rejected the government's "functional-recess" approach, but it remains the administration's position on the matter. If left intact, the same theory may be invoked to support additional unlawful appointments in other circuits. The Court should grant the petition in order to conclusively repudiate the government's erroneous view of the President's recess-appointment power.

ARGUMENT

The government's petition raises constitutional issues of obvious significance. This case implicates

questions concerning the scope of the Recess Appointments Clause and the separation-of-powers principles upon which it is based. The fundamental and nationwide importance of these issues is beyond serious dispute.

Moreover, certain of the underlying questions have engendered disagreement among lower courts. In particular, the D.C. Circuit's interpretation of the phrase "that may happen" conflicts with constructions endorsed by other courts of appeals. See *Evans* v. *Stephens*, 387 F.3d 1220, 1226-27 (11th Cir. 2004) (en banc); *United States* v. *Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States* v. *Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). These disagreements are detailed in the government's petition (at 23-24) and will not be rehearsed here.

The Court's review is also necessary to provide guidance to courts that are currently confronting these questions. Petitions for review and cross-applications for enforcement of Board decisions are pending before at least eight courts of appeals; resolution of these cases depends on the validity of the January 4 appointments. The D.C. Circuit alone is holding more than thirty such cases in abeyance. See, *e.g.*, *Sabo, Inc.* v. *NLRB*, No. 13-1010 (order filed 1/25/2013); *NOVA Southeastern Univ.* v. *NLRB*, No. 11-1297 (order filed 2/19/2013). This urgent need for guidance is likewise explained in the government's petition (at 11-12, 29-31), and needs no repetition.

All of this is more than enough to warrant this Court's review, but there is another reason to grant the petition. As explained below, the January 4 appointments were an unprecedented invocation of the President's recess-appointment power. The

government has defended those appointments with a breathtaking view of the Recess Appointments Clause. Such "hydraulic pressure" by one branch of government "to exceed the outer limits of its power" is precisely what this Court must guard against. *INS* v. *Chadha*, 462 U.S. 919, 951 (1983).

THE GOVERNMENT'S THEORY OF THE RECESS-APPOINTMENT POWER IS UNPRECEDENTED AND UNTENABLE

A. The Senate Was Not In Recess On January 4, 2012

It has long been settled that the President may not make intra-session recess appointments unless, at a minimum, the Senate has "adjourn[ed] for more than three days" under the Adjournments Clause. See U.S. Const. art. I, § 5, cl. 4. The government concedes as much: "[T]he Executive has long understood that such short intra-session breaks, which do not genuinely render the Senate unavailable to provide advice and consent, do not trigger the President's recess-appointment authority." Pet. Br. 21.

This baseline principle has deep roots. Attorney General Daugherty – perhaps the most oft-cited authority for the practice of intra-session recess appointments – confirmed long ago that the Adjournments Clause is a structural constraint on the Recess Appointments Clause. See *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921). He declared that if the Senate has not adjourned for more than three days, "no one . . . would for a moment contend that the Senate is not in session." *Ibid.*

It is also sensible to read these Clauses together, because they turn on the same basic fact of the Senate's availability. The Adjournments Clause was intended to prevent one house of Congress from unilaterally disabling itself (at the expense of the other) "without any regard to the situation of public exigencies." 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, at 368 (Jonathan Elliott ed., 2d ed. 1836) (Virginia convention) (remarks of James Madison). Similarly, the Recess Appointments Clause – at a time of extended recesses and limited communication – guarded against "public inconveniences"[6] by allowing the President to fill vacancies that were "necessary for the public service to fill without delay." The Federalist No. 67, *supra*, at 455.

Because the Framers considered three-day breaks *de minimis* periods of congressional unavailability under the Adjournments Clause, the appointment-by-necessity function of the Recess Appointments Clause would likewise be out of place during such brief adjournments. See Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 419-21 (2005) (explaining why Clauses should be read together). Even the United States has urged that it would make "eminent sense" to "apply the three-day rule explicitly set forth in the Adjournment Clause" in construing the Recess Appointments Clause. Reply Brief for Intervenor United States at 21, *Evans* v. *Stephens*, 407 F.3d 1272 (11th Cir. 2005) (en banc). Similarly, this Court has employed the

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[6] See 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, at 135 (Archibald Maclaine)

Adjournments Clause's three-day rule to construe other constitutional provisions that hinge on congressional availability. See *Wright* v. *United States*, 302 U.S. 583, 589-90 (1938) (Pocket Veto Clause).

Prior administrations have long hewn to this principle. To our knowledge, no President in history has attempted an intra-session recess appointment when the Senate has not adjourned for more than three days under the Adjournments Clause. In the last thirty years, the shortest intra-session recess in which a recess appointment was made was ten days. See Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions*, at 3 (2012).

Thus, although not squarely addressed by the court of appeals,[7] the January 4 appointments were quite literally unprecedented. The Senate never obtained – and did not even seek – the House's consent to adjourn for more than three days. As a consequence, the Senate was constitutionally required to (and did) convene every three days. When the appointments were made, the Senate was

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[7] Because the court held that the Recess Appointments Clause does not permit *any* intra-session recess appointments, it necessarily rejected the alternative proposition that "the Recess" means "any adjournment of more than three days pursuant to the Adjournments Clause." Pet. App. 29a (noting that these Clauses "exist in different contexts" and "should [not] be read together"). The court's *dicta*, however, should not be read to cast doubt on the logical and well-supported relationship between the Clauses if this Court were to hold that intra-session recess appointments are permitted. See *New Vista*, Case No. 11-3440, Slip at 91 (noting that a durational limitation on intra-session recess appointments is superior to the government's "functionalist" approach).

not in "recess" as that term has ever been understood.

B. The President May Not Unilaterally Declare A Session Of Congress To Be A "Functional" Recess

In the court of appeals, the government defended the President's appointments on the ground that the Senate was not "really" holding sessions at the time of the appointments. The government insisted that the Senate's pro forma sessions, at which no business was conducted, were "functionally indistinguishable" from a recess. Pet. C.A. Br. 38. Thus, the President could infer that the Senate was "really" in an undeclared *twenty*-day recess, from January 3 to January 23, 2012, and make recess appointments on that basis. *Id.* at 35-47.

The D.C. Circuit correctly rejected the government's functional-recess theory. Pet. App. 29a-30a. But this theory remains the official position of the administration and creates a risk of future unlawful appointments in other jurisdictions. This Court's review is therefore warranted.

1. The Government's Functional-Recess Approach Is Flawed And Unworkable

According to the government, the President has exclusive discretion to gauge the quality of a Senate session and assess whether the Senate is "functionally" in recess. See OLC Opinion, *supra*, at 13 ("[T]he President may determine that pro forma sessions at which no business is to be conducted do not interrupt a Senate recess for purposes of the Recess Appointments Clause."). The government advocated that same position before the court of

appeals. This functional-recess approach is untenable for several reasons.

a. Most fundamentally, the government's approach flouts the bright-line rule explained above: Any intra-session recess appointment requires, at a minimum, that the Senate adjourn for more than three days under the Adjournments Clause. The Senate never did that. Indeed, because the Senate never obtained the House's consent, it could not lawfully adjourn for more than three days. How could the Senate be in a twenty-day recess when the Constitution commands that it *not* be?

The government offers two responses. *First*, it posits that a pro forma session might satisfy the Adjournments Clause, yet not interrupt a recess under the Recess Appointments Clause, because the Clauses serve different functions. Whereas "[t]he Adjournments Clause relates to internal operations" and "purely internal matters," the government contends, "the Recess Appointments Clause defines the scope of an exclusively Presidential power" and "has ramifications far beyond the Legislative branch." Pet. C.A. Br. 49-50.

This argument is circular: The government simply relies on one assumed conclusion (the Adjournments Clause concerns only Congress) to support another (the Adjournments Clause cannot affect the President's appointment power). In any event, the argument requires one to accept that the Senate could be in "session" for one constitutional provision while simultaneously in "recess" for another. The Constitution supports no such dissonance. The Senate is either constitutionally available, or it isn't. There is no reason to presume that the Framers more abhorred unfilled vacancies

than they did "the evils which might result from the want of a proper concert and good understanding between the houses." See 1 St. George Tucker, *Blackstone's Commentaries* Note D, 206 (1803) (describing original intent of Adjournments Clause).

Second, the government suggests that perhaps the Senate did adjourn for more than three days – it just did so unconstitutionally. Pet. C.A. Br. 50-51.[8] This argument is contradicted by nearly a century of congressional practice. Congress has consistently and without challenge convened pro forma sessions to satisfy the Adjournments Clause since the 1920s. See, *e.g.*, 71 Cong. Rec. 3045 at 3228-29 (1929) (House resolution scheduling pro forma sessions); 96 Cong. Rec. 16,980 (Dec. 22, 1950) (Senate resolution scheduling pro forma sessions); *id.* at 17,020 (Dec. 26, 1950) (same); *id.* at 17,022 (Dec. 29, 1950) (same); 98 Cong. Rec. 3998-99 (Apr. 14, 1952); 126 Cong. Rec. 2574 (Feb. 8, 1980) (same); 127 Cong. Rec. 190 (Jan. 6, 1981) (same). This "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).[9]

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[8] The government muses that perhaps the Senate obtained the House's tacit consent to enter a recess. Pet. C.A. Br. 51-52 & n.31. That is wrong. In fact, many members of the House openly *forswore* any such consent. See Resp. C.A. Br. 8-9 (discussing letter from 78 representatives directing that "all appropriate measures be taken to prevent any and all recess appointments by preventing the Senate from officially recessing") (quoting Press Release, Senator David Vitter, *Vitter, DeMint Urge House to Block Controversial Recess Appointments* (May 25, 2011)).

[9] This should not be confused with the government's argument that historical practice supports its view of the Recess Appointments Clause. See Pet. 17-18. Although intra-session

b. The functional-recess approach is also dangerously unworkable. The Adjournments Clause has long stood as a bright-line limit on intra-session recess appointments. Casting aside that barrier would afford the President virtually unbounded authority to declare the Senate in recess. If the touchstone is simply whether *the President* concludes that the Senate, though holding sessions, is "unavailable to perform its advise-and-consent function," OLC Opinion, *supra*, at 23, then nothing would preclude the President from declaring a de facto "recess" in any number of situations. Suppose, for example, that the Senate is engaged in lengthy debate or, in the President's view, simply taking too long to consider a nomination. Separation of powers principles do not evaporate in times of protracted political debate or even genuine impasse.

The separation of powers "is a prophylactic device" that "establish[es] high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). The government's approach is barely a line in the sand. How robust must a session be to constitute a "real" session? Will thirty Senators for sixty minutes suffice? Sixty Senators for thirty minutes? What if all Senators are in attendance, but they take up little or no business? There is no sufficient limiting principle to the government's position. The court of appeals

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recess appointments have occurred with some frequency in the last century, the practice was expressly disavowed by the Framers. See Pet. App. 20a-23a. The use of pro forma sessions does not have a similarly fractured history. There is no evidence that the Framers contemplated two types of sessions – some "real" for constitutional purposes, and others not.

rightly observed that the functional-recess test would "eviscerate the Constitution's separation of powers." Pet. App. 29a.

Not only that, but the government's approach is hopelessly backward-looking. It will not be clear *ex ante* whether the Senate has entered a "functional" recess because that determination depends on the nature and quality of sessions yet to occur. The government relies on the fact that the Senate "in fact conducted no business" between January 3, 2012 and January 23, 2012, to justify recess appointments that were made on *January 4, 2012*. Pet. C.A. Br. 34. If the Senate *did* conduct business on January 5, 2012, could anyone dispute that the Senate was not in recess – even a "functional" one – for more than 48 hours?[10]

c. History and practice likewise militate against the government's position. As far as we can determine, no President has ever attempted an intra-session recess appointment unless the Senate has adjourned for more than three days with the House's consent. Such "prolonged reticence would be

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[10] The government points out that the Senate stated in advance that "no business [would be] conducted" at its pro forma sessions. See 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011). But that cannot be dispositive. For starters, the Senate does not always state that it intends to conduct no business during a series of pro forma sessions. See 154 Cong. Rec. S10,504 (daily ed. Oct. 2, 2008) (providing that there would be "no business conducted, except with the concurrence of the two leaders"); *id.* at S6336 (daily ed. June 27, 2008) (order silent on whether business would be conducted). More importantly, business can *always* be conducted in a pro forma session by unanimous consent – exactly what occurred here, when the Senate *passed a bill* during one such session. 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing payroll tax-cut extension).

amazing if [the practice] were not understood to be constitutionally proscribed." *Plaut*, 514 U.S. at 230. In fact, only once in history has a President attempted an *inter*-session recess appointment under those circumstances. And that incident is a case study for why "high walls and clear distinctions," *id.* at 239 – not boundless Executive discretion – are necessary in this area:

When the clock struck noon on December 7, 1903, President Theodore Roosevelt made 160 recess appointments during what he deemed a "constructive recess" in the moments-long period between the first and second sessions of the 58th Congress. See Hogue, *supra*, at 10. The tactic was widely condemned by Congress. In a 1905 report discussing the incident, the Senate Judiciary Committee lamented that "[t]he theory of 'constructive recess' constitutes a heavy draft upon the imagination." S. Rep. No. 4389,
58th Cong., 3d Sess. 2 (1905) (reprinted in 39 Cong. Rec. 3823 (1905). In words especially befitting the present case, the Committee admonished that

> the Framers [in drafting the Recess Appointments Clause] were providing against a real danger to the public interest, not an imaginary one. *They had in mind a period of time during which it would be harmful if an office were not filled; not a constructive, inferred, or imputed recess, as opposed to an actual one.*

Ibid. (emphasis added).

d. If there were any doubt whether the Senate was "really" in session, the benefit of that doubt lies firmly and exclusively with the Senate. The Constitution grants Congress plenary power to "determine

the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Thus, this Court has confirmed that "all matters of method [of proceeding] are open to the determination of the house." *United States* v. *Ballin*, 144 U.S. 1, 5 (1892). Part and parcel of that power is the Senate's ability to "prescribe a method for . . . establishing the fact that the house is in a condition to transact business." *Id.* at 6; see Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790), *reprinted in* 2 The Founders' Constitution, art. I, § 5, cl. 1-4, Doc. 14 (stating that "[e]ach house of Congress possesses this natural right of governing itself," including "fixing its own times and places of meeting").

Courts will not second-guess a determination by Congress that it has duly assembled. Even the judicial inquiry into whether a bill was lawfully passed is a narrow one: If Congress says that it was, then that settles the matter. See *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 672 (1892). This principle is firmly grounded in the separation of powers and the "respect due to a coordinate branch of the government." *Id.* at 673. It would flout that principle for the President to cross-examine (and conclusively judge) whether the Senate is "functionally" in recess when that body declares itself to be in session.

The government protests that the Senate cannot deprive the President of the power to make recess appointments by falsely declaring itself in session when it is actually unable to fulfill its advice-and-consent function. See Pet. C.A. Br. 60-65. Even if that were true, it is beside the point. As explained below, the Senate *can* provide advice and consent during pro forma sessions, just as it can fulfill other core legislative functions. Surely it is in the Senate's

broad rulemaking power to declare itself in session at a time when it could, and proximate to this instance did, pass legislation.

The Recess Appointments Clause was "carefully devised" to not "in the slightest degree chang[e] the policy of the Constitution, that [] appointments are only to be made with the participation of the Senate." S. Rep. No. 4389, 58th Cong., 3d Sess. 2 (1905). The Senate can abrogate (or eliminate) the President's recess-appointment power by choosing to remain "perpetually in session . . . for the appointment of officers." Joseph Story, 2 *Commentaries on the Constitution of the United States* § 1557, at 416 (3d ed. 1833). That is precisely what the Senate did when it elected, consistent with its rules, to remain in session between December 17, 2011, and January 23, 2012. It is neither remarkable nor troubling that the President's "auxiliary" appointment power was rendered unnecessary as a consequence.

2. The Senate Was Not In A "Functional" Recess

Even if the Recess Appointments Clause justified the session-by-session holistic assessment urged by the government, the January 4 appointments are still invalid. The Senate's pro forma sessions were real sessions – not metaphysical ones. The Senate was not in a "functional" recess.

a. Most fundamentally, the Senate was capable of performing legislative functions during its pro forma sessions. This is not post hoc speculation – the Senate actually *passed legislation* during the period in question. At the Senate's December 23, 2011, pro forma session, the Senate passed by unanimous consent the Temporary Payroll Tax Cut Continua-

tion Act of 2011. See 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing H.R. 3765) The President later signed that bill into law. In fact, the bill was passed at the *President*'s urging – belying any claim that the Senate was incapable of acting on presidential requests (or nominations) during this period. *Contra* OLC Opinion, *supra*, at 1 (defending appointments on ground that Senate's pro forma sessions rendered it unavailable to "participate as a body in making appointments").

This was no anomaly. The Senate and the House have used pro forma sessions to conduct business on many occasions. For instance, at a pro forma session on August 5, 2011, the Senate passed the Airport and Airway Extension Act of 2011. 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011). Even more recently, in a pro forma session on September 28, 2012, the House passed three bills. 158 Cong. Rec. H6285-86 (daily ed. Sept. 28, 2012). Indeed, according to the Congressional Research Service, the House "regularly permits business on pro forma days, including the introduction and referral of legislation, the filing of committee reports and co-sponsorship forms, and the receipt and referral of executive communications and Presidential messages." *Id.* at S5954 (Aug. 2, 2012).

The government touts the fact that the Senate's scheduling order contemplated that there would be "no business conducted" at the sessions in question. Pet. C.A. Br. 31 (quoting 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011)). That is true, but beside the point. The relevant inquiry under the Recess Appointments Clause is whether the Senate is *capable* of acting on appointments – not whether it intends to do so. See OLC Opinion, *supra*, at 10

("[T]he recess appointment power is required to address situations in which the Senate is *unable* to provide advice and consent on appointments.") (emphasis added). The government confuses the Senate's ability to act with its willingness to do so. Quite obviously, the advice-and-consent function includes the power to withhold consent. It would turn that function on its head if the President could declare a "recess" whenever the Senate stated that it would take no action on a nomination for some period of time.

Nor is it meaningful that the Senate could act only through unanimous consent at its pro forma sessions. See Pet. C.A. Br. 32-33. "The Senate is fundamentally a 'unanimous consent' institution." Walter J. Oleszek, Cong. Research Serv., 98-225, *Unanimous Consent Agreements in the Senate* 1 (2008). The vast majority of the Senate's business, especially on nominations, is conducted by unanimous consent. Maeve P. Carey, Cong. Research Serv., R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, at 5 (2012); see generally Elizabeth Rybicki, Cong. Research Serv., RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure* (2013). In fact, the Senate confirmed an array of presidential nominees by unanimous consent the same day that it scheduled the sessions in question. 157 Cong. Rec. S8769-70 (daily ed. Dec. 17, 2011).

b. Pro forma sessions are universally accepted to be "real" sessions for other constitutional purposes. The most prominent of these is the Adjournments Clause. As explained above, Congress has used pro forma sessions to avoid unlawful adjournments for

nearly a century. See, *e.g.*, 71 Cong. Rec. 3045 at 3228-29 (1929); 96 Cong. Rec. 16,980 (Dec. 22, 1950); *id.* at 17,020 (Dec. 26, 1950); *id.* at 17,022 (Dec. 29, 1950); 98 Cong. Rec. 3998-99 (Apr. 14, 1952); 126 Cong. Rec. 2574 (Feb. 8, 1980); 127 Cong. Rec. 190 (Jan. 6, 1981). No administration has challenged the validity of these sessions.

Pro forma sessions are also used to satisfy the Twentieth Amendment, which requires that "Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January." U.S. Const. amend. XX, § 2. Congress has, on numerous occasions, convened pro forma to comply with that "assembl[y]" requirement. See H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (1979); H.R. Con. Res. 260, 102d Cong., 105 Stat. 2446 (1991); 151 Cong. Rec. S14,421 (daily ed. Dec. 21, 2005); 153 Cong. Rec. S16,069 (daily ed. Dec. 19, 2007); 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). This practice has likewise gone unchallenged for decades. In fact, the government has acknowledged that Congress successfully commenced a new session by convening pro forma on January 3, 2012. See OLC Opinion at 1 (arguing that a functional recess began "on January 3, 2012, [when] the Senate convened . . . to begin the second session of the 112th Congress").[11]

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[11] Pro forma sessions are treated just like any other sessions for statutory purposes, as well. The Congressional Research Service has identified twenty-two statutes in which various time periods are computed based on days that Congress is "in session." 158 Cong. Rec. S5954-55 (Aug. 2, 2012) (CRS report). Pro forma sessions are taken into account by both the President and Congress when performing those calculations. *Ibid.*

The government has not persuasively explained why a pro forma session is sufficiently robust to satisfy some constitutional criteria but not others. There is nothing unique to the Recess Appointments Clause that commands a higher threshold of Senate availability than does the rest of the Constitution. When the Senate has convened as a legislative body – pro forma or otherwise – it is fully capable of discharging its constitutional mandate. The advice-and-consent function is no exception.

* * *

For all of these reasons, the government's understanding of the Recess Appointments Clause is flawed. This case is an ideal vehicle for the Court to reject the government's position and forestall future unlawful appointments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MARK T. STANCIL
Counsel of Record
WILLIAM J. TRUNK
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Washington, D.C. 20006
(202) 775-4500
mstancil@robbinsrussell.com

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NOEL CANNING, A DIVISION OF
THE NOEL CORP., ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the D.C. Circuit Court of Appeals

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
**Counsel of Record*
BRIANNE J. GOROD
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St., NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org
Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF AMICUS CURIAE[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in preserving the balanced system of government laid out in our nation's charter and accordingly has an interest in this case.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari in this case presents an important question about the scope of a presidential power that is fundamental to the proper operation of the federal government: the scope of the President's power to make temporary appointments pursuant to the Recess Appointments Clause. As the Petition demonstrates, the decision of the court below is in conflict with the decisions of other federal courts of appeals, contradictory to settled Executive Branch

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

practice, and inconsistent with the Constitution's text and history. This brief in support of the Petition explains in greater detail just how significantly the decision below undermines the purpose of the Recess Appointments Clause as evidenced by the Constitution's structure, text, and history. That structure, text, and history all make clear that the Recess Appointments Clause was adopted to ensure that the President is able to make temporary appointments to Executive and Judicial Branch offices even when the Senate is unavailable to provide its advice and consent.

When the Framers drafted our enduring Constitution, their design sharply departed from the precursor Articles of Confederation in its creation of a strong Executive Branch headed by a single President. Under the Constitution, this new President would have sole responsibility for executing the nation's laws, but he would be aided in that constitutional obligation by subordinate officers of his choosing. Although the Framers thought the Senate should also generally play a role in the appointments process for those subordinate officers and members of the federal courts, they recognized that the Senate would not be continually in session, and they did not want the President to be disabled from making appointments while the Senate was in recess. Thus, the Framers drafted the Recess Appointments Clause to give the President the Power to fill vacancies that existed while the Senate was in recess and thus unable to participate in the confirmation process.

By giving the President the power to "fill up all Vacancies that may happen during the Recess of the Senate," the Framers ensured that the President could fill any vacancies that existed when the Senate was unable to perform its advise-and-consent function, whether because it was in a recess between sessions or during a session. This interpretation is consistent with Framing-era understandings of the term "recess," and the court below points to nothing in the Clause's text or history that compels a contrary result. The court below rested its holding in large part on the rarity of intra-session recess appointments during the Founding period, even though the rarity of such appointments is readily explained by the rarity of such recesses during this period. That fact provides no basis for ignoring the Constitution's text and structure and the longstanding practice subsequent to the Framing period.

Similarly, because the Recess Appointments Clause is intended to ensure that the President can make temporary appointments while the Senate is in recess, what matters is not when the vacancy arose, but whether it existed when the Senate was in recess. The court below pointed to evidence that the literal language of the Clause *could* refer to vacancies that arose during the Senate's recess, but nothing that suggests that this is the *only* possible meaning. To the contrary, evidence from the Founding suggests that the language could also refer to vacancies that *existed* during the recess, and that interpretation is most consistent with the Constitution's structure and history, as well as long-settled practice.

Amicus urges the Court to grant the Petition for a Writ of Certiorari to resolve the conflict created by the court below and clarify the proper scope of the President's recess appointment authority.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO CLARIFY THE SCOPE OF THE PRESIDENTS AUTHORITY TO MAKE RECESS APPOINTMENTS

The Appointments Clause of the Constitution vests the President with the authority to "nominate, and by and with the Advice and Consent of the Senate, [to] appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Immediately following the Appointments Clause, the Recess Appointments Clause vests the President with the "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Id.* art. II, § 2, cl. 3.

The Executive Branch has long understood the Recess Appointments Clause to confer the authority necessary to fill vacancies that exist during any recess when the Senate is unavailable to provide its advice and consent, irrespective of when the vacancy first arose. Consistent with that interpretation, Presidents have made hundreds of

recess appointments since the nation's Founding. The court below held that this settled understanding was unconstitutional, concluding that the text and history of the Recess Appointments Clause compelled a far more narrow interpretation of the President's authority under this provision. This is wrong. The crabbed interpretation of the court below is not only inconsistent with settled practice, it is inconsistent with the structure, text, and history of the Constitution.

A. The Constitution's Structure Supports a Robust Interpretation of the Recess Appointments Clause.

Article II of the U.S. Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. The Constitution's establishment of a "single, independent Executive" was a direct response to perceived infirmities of the Articles of Confederation, which had vested executive authority in the Continental Congress, Arts. of Confed. art. IX, §§ 4, 5. *See, e.g.*, The Federalist No. 70 (Alexander Hamilton) ("all men of sense will agree in the necessity of an energetic Executive"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 Yale L.J. 541, 599-603 (1994) ("the Constitution's clauses relating to the President were drafted and ratified to energize the federal government's administration and to establish one individual accountable for the administration of federal law").

This new President was given the responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3; *Myers v. United States*, 272 U.S. 52, 117 (1926) ("The vesting of the executive power in the President was essentially a grant of the power to execute the laws."), and, alone among the government offices established by the new Constitution, was required to "be on duty continuously." Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 378 (1995); *see* 12 Op. Att'y Gen. 32, 35 (1866) ("it is of the very essence of executive power that it should always be capable of exercise"). Unlike Congress, which was required only to "assemble at least once in every Year," U.S. Const., art. I, § 4, cl. 2, and could, on consent, adjourn as it saw fit, *id.* art. I, § 5, cl. 4, the President, as designed by the Framers, was always acting to execute the laws. *See* 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution 135 (Elliot ed. 1836) (contrasting Congress, who "are not to be sitting at all times," with the President who is "perpetually acting for the public").[2]

Tellingly, the office of the Vice President was established in large part to ensure that the office of

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[2] The idea that the government would be aided by an independent executive in continual service dated back at least to John Locke's foundational work on governmental structure. *See* John Locke, The Second Treatise of Civil Government § 144 (1690) ("it is necessary there should be a power always in being, which should see to the execution of the laws that are made, and remain in force").

president would never be vacant and that there would be stability in any unplanned presidential succession. *See* Richard Albert, *The Evolving Vice Presidency*, 78 Temp. L. Rev. 811, 815-23 (2005). Two of the Constitution's 27 amendments are also designed to provide additional safeguards against the presidency ever being left vacant. U.S. Const. amend. XX (providing for the selection of a president if the President-elect dies or a new president is not selected before the new term is set to begin); *id.* XXV (establishing procedures to fill the vice-presidency and for determining presidential disability).

To aid the President in fulfilling his responsibility to execute the nation's laws, Article II expressly provided the President with the Power to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," U.S. Const. art. II, § 2, cl. 1, and recognized that there would be subordinate Executive Branch officers who would also aid the President in executing the nation's laws. *See Free Enters. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010) ("In light of '[t]he impossibility that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.' (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)); *Myers*, 272 U.S. at 117 ("the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has

since been repeatedly affirmed by this court"); The Federalist No. 72 (recognizing that there would be "assistants or deputies of the chief magistrate" who "ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence"); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 719 ("If the president is to be an effectual executive, he must have the aid of others, otherwise his power to execute the law is chimerical.").

While the Framers provided that the Senate would be able to give its "Advice and Consent" to relevant executive nominations, they made absolutely clear the importance of the President's authority to appoint subordinate Executive Branch officials, as well as Judges of the Supreme Court and other public servants. U.S. Const. art. II, § 2. As this Court has noted, "[b]y vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevent[ed] congressional encroachment upon the Executive and Judicial Branches." *Edmond v. United States*, 520 U.S. 651, 659 (1997). The Framers also believed that vesting the appointment authority in a single individual would tend to produce better appointments than vesting that authority in one or both houses of the legislature. *See id.* ("[t]his disposition was also designed to assure a higher quality of appointments"); *The Federalist No. 76* ("one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices,

than a body of men of equal or perhaps even of superior discernment").

To be sure, the Framers also gave the Senate a role to play to prevent abuses of power, providing that it could offer its advice and consent to any nominations. *See Edmond*, 520 U.S. at 659 (noting that Senate involvement could "curb Executive abuses of the appointment power"). The Framers, however, anticipated that this check would rarely be exercised. *See* The Federalist No. 76 ("It is also not very probable that his nomination would often be overruled."); 3 Joseph Story, Commentaries on the Constitution of the United States § 1526 ("Nor is it to be expected, that the senate will ordinarily fail of ratifying the appointment of a suitable person for the office."). Instead, they believed the Senate's advise-and-consent function would make the President "more circumspect, and deliberate in his nominations for office." *Id.* § 1525; *see* The Federalist No. 76 ("The possibility of rejection would be a strong motive to care in proposing.").

But the Framers did not want the Senate's role to make appointments impossible during the (often lengthy) periods when the Senate would be unavailable to provide its advice and consent. Thus, they provided that the President, who would remain continually in service, could make temporary appointments even when the Senate was not available to perform its advice-and-consent function. *See 4 Debates in the Several State Conventions, supra,* at 135 (observing that "this power can be vested nowhere but the executive . . . ; for, though the Senate is to advise him in the

appointment of officers, &c., yet, during the recess, the President must do this business, or else it will be neglected; and such neglect may occasion public inconveniences"). As Attorney General Wirt explained in 1823, "the President *alone* cannot make a *permanent appointment* to those offices . . . but that, whensoever a vacancy shall exist which the public interests require to be immediately filled, and in filling which, the advice and consent of the Senate cannot be immediately asked, because of their recess, the President shall have the power of filling it by an appointment to continue only until the Senate shall have passed upon it; or, in the language of the constitution, till the end of the next session." 1 Op. Att'y Gen. 631, 632 (1823).

In other words, the Recess Appointments Clause operates as a critical "supplement" to the Appointments Clause, ensuring that the Senate would not need to stay in session continuously and that the President would be able to fill any vacancies during recesses. As Alexander Hamilton described it in *The Federalist*, the Recess Appointments Clause created an "auxiliary method of appointment, in cases to which the general method was inadequate." The Federalist No. 67; *see id.* ("it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers," even though it "might be necessary for the public service to fill [vacancies] without delay"); Story, *supra*, § 1551 ("There was but one of two courses to be adopted; either, that the senate should be perpetually in session, in order to provide for the appointment of officers; or, that the president should be authorized to make

temporary appointments during the recess . . . . The former course would have been at once burthensome to the senate, and expensive to the public. The latter combines convenience, promptitude of action, and general security.").

Accordingly, the Recess Appointments Clause, properly understood, was designed to play an important role in ensuring that vacancies in the Executive and Judicial Branches could be filled even when the Senate was not available to provide its advice and consent.[3] This authority was not intended to be limited only to inter-session recesses or to vacancies that arose during the recess, as such limitations would undermine the ability of the Clause to serve its purpose in the constitutional structure. Nothing in the Constitution's text or history compels a contrary result, as the next two sections show.

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[3] The Third Circuit recently held otherwise, concluding that "a crucial aspect of the Clause's purpose [was] to preserve the Senate's advice-and-consent power by limiting the president's unilateral appointment power." *NLRB v. New Vista Nursing & Rehabilitation*, 2013 WL 2099742, at *18 (3rd Cir. May 16, 2013). This makes no sense. The Recess Appointments Clause was an affirmative grant of "unilateral appointment power" to the President; he would not have had that power at all were it not for the Recess Appointments Clause. Thus, although the Clause did put limits on the scope of that power, those limits were plainly not the principal reason the Framers adopted the Clause, as the Third Circuit would have it.

B. The Text and History of the Recess Appointments Clause Confirm That the President's Authority Is Not Limited to Inter-Session Recesses.

As noted above, the Recess Appointments Clause gives the President the "Power to fill up all Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. The Clause plainly does not distinguish between inter-session and intra-session recesses. Instead, it simply uses the term "Recess," which would have been understood at the time of the Framing to refer to any "[r]emission or suspension" of the Senate's activities. 2 Samuel Johnson, A Dictionary of the English Language 1650 (1755).

Indeed, it would have been odd for the Framers to distinguish between inter-session and intra-session recesses, given the functional purpose the Recess Appointments Clause was intended to serve. As discussed above, the Recess Appointments Clause was intended to ensure that the President could appoint public officials for temporary periods when the Senate was unable to perform its advice-and-consent function, *see* 1 Op. Att'y Gen. at 632 ("The substantial purpose of the constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed."), and as the Government notes, "[t]he Senate is no more available to provide its advice and consent during an intra-session recess" than an inter-session one, Pet. 15. Further, there is no less reason to think that the President will sometimes need to fill vacancies in important government

positions during such periods. *Id.*[4]

The court below and Respondent rest much of their argument to the contrary on the supposed significance of the Clause's use of the definite article "the," rather than one of the indefinite articles, "a" or "an." Pet. App. 19a (explaining that the difference between "'the Recess'" and "'a recess'" is "not an insignificant distinction" and "[i]n the end it makes all the difference"); BIO 11. According to the court, "that definite article suggests specificity," and because "[i]t is universally accepted that 'Session' [in the Clause] refers to the usually two or sometimes three sessions per Congress," "'the Recess' should be taken to mean only times when the Senate is not in one of those sessions." *Id.* at 20a. This is plainly wrong.

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[4] The court below rejected a "functional approach" to defining the meaning of the Recess Appointments Clause, preferring the "clarity of the intersession interpretation." Pet. App. 28a. But far from offering enhanced "clarity," the approach taken by the court below leads to the absurd result that the President could make recess appointments during an intersession recess, no matter how short, but not during a lengthy intra-session recess. *See* Alexander M. Wolf, Note, *Taking Back What's Theirs: The Recess Appointments Clause, Pro Forma Sessions, and a Political Tug-of-War*, 81 Fordham L. Rev. 2055, 2076 (2013) (recounting President Theodore Roosevelt's appointment of 160 officials during the "'infinitesimal fraction of a second,' when a session is first gaveled in, 'which is the recess between the two sessions'"). This cannot have been what the Framers had in mind when they structured the presidential appointment powers.

To start, "a" and "an" can also suggest specificity (as in, "I interviewed an applicant yesterday whom I liked very much"), and "the" can also refer to a class of things. Pet. 18. As the Government notes, "the Constitution directs the Senate to choose a temporary President of the Senate 'in *the Absence* of the Vice President,'" a directive that does not apply to any specific type of absence. *Id.* at 19. One cannot imagine that that phrase would mean anything different had the Framers provided for a temporary President of the Senate "during an Absence of the Vice President." Moreover, the court below offers no reason to conclude from the choice of a definite article that the specific recesses the Framers had in mind were inter-session recesses, rather than (for example) those recesses when the Senate was functionally unable to perform its advise-and-consent function. *See New Vista*, 2013 WL 2099742, at *17 (rejecting the textual analysis of the court below).[5]

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[5] The Third Circuit ultimately held that recess appointments can only be validly made during an inter-session recess because "nothing in the Constitution establishes the necessary length of an intrasession break that would constitute a recess." *New Vista*, 2013 WL 2099742, at *21. But there would have been no need to establish a "necessary length" if the inquiry were a functional one, *viz.*, whether the Senate was unavailable to provide its advice and consent. *See supra* at 9-11. Likewise, this functional definition makes clear why the Government's interpretation does not mean that "the Clause would allow recess appoints during *any* break in Senate business," as Respondent argues. BIO 12. The Third Circuit and Respondent also emphasize that recess appointments last until the "End of [the Senate's] next Session." *New Vista*, 2013 WL 2099742, at *22; BIO 13. Because the Framers anticipated that the President would be

The court below also placed tremendous significance on the putative lack of intra-session recess appointments in the period immediately after the Framing, explaining that "it is well established that for at least 80 years after the ratification of the Constitution, no President attempted such an appointment, and for decades thereafter, such appointments were exceedingly rare." Pet. App. 23a-24a; *see id.* at 24a ("early understanding of the Constitution is more probative of its original meaning than anything to be drawn from administrations of more recent vintage").

But there is a simple explanation for that fact that says nothing at all about the constitutionality of such appointments, or how they would have been viewed by the Founding generation. There were few intra-session recess appointments during this early period because, as the court below acknowledged, there were few intra-session recesses during this period. And there were none of any significant length. *See* Pet. App. 24a ("it is true that intrasession recesses of significant length may have been far less common in those early days than today"). As Edward Hartnett explains, the early Congresses were

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able to make recess appointments whenever the Senate was unable to provide its advice and consent, be it because of an intra-session recess or an inter-session one, they needed to ensure that the temporal limit in the Clause would accommodate both situations.

characterized by very long inter-session recesses and "occasional intrasession recesses lasting about a week or so in December or early January, typically spanning the Christmas and New Year holidays." Hartnett, *supra*, at 408; T.J. Halstead, Congressional Research Service, RL33009, Recess Appointments: A Legal Overview CRS-10-11 (July 26, 2005) (noting that Congress "took few intrasession recesses, other than brief holiday recesses, until the advent of the modern era"); Peter Strauss, *The Pre-Session Recess*, 126 Harv. L. Rev. F. 130, 131 (2013) ("[i]n the travel circumstances of the time, short recesses were not likely").[6] By contrast, "in recent decades, the Senate's intra-session recesses have often lasted longer than its inter-session recesses." Pet. 15. Given that early intra-session recesses were exceedingly rare and always short, and that they generally occurred over holidays when little, if any, business would have been conducted, it is utterly

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[6] The Third Circuit took the position that there is "no reason to discount the" relevance of the early history just because "intrasession breaks were generally no longer than two weeks" because "modern practice has shown[] [that] it is sometimes in the interest of presidents to make recess appointments during breaks as short as two weeks." *New Vista*, 2013 WL 2099742, at *25. But given the significant differences between the Framing and the modern period (and the fact that early intra-session recesses occurred over holidays), it is utterly unsurprising that early presidents saw less need than modern presidents to make recess appointments during intra-session recesses of similar length.

unsurprising that the early presidents saw little need to make intra-session recess appointments.[7]

According to the court below, the presidential recess appointments power, expressly granted in the text of the Constitution and repeatedly exercised by numerous Presidents should now be effectively barred because the conditions under which it could be exercised rarely, if ever, arose during the Founding period. That cannot be right. *Cf. Boumediene v. Bush*, 553 U.S. 723, 752 (2008) (concluding that the Court should not "infer too much, one way or the other, from the lack of historical evidence on point" when the relevant historical period did not reveal "cases with close parallels to this one"). The text, history, and structure of the Constitution all support the settled view that the President may make recess appointments during those intra-session recesses when the Senate is unavailable to provide its advice and consent.

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[7] As noted, the court below emphasized the absence of intra-session recess appointments "for at least 80 years after the ratification of the Constitution." Pet. App. 23a. But, as Hartnett points out, "[t]he first time that Congress took an extended intrasession recess was during the Presidency of Andrew Johnson," roughly 80 years after the Constitution was ratified. Hartnett, *supra*, at 408.

C. The Text and History of the Recess Appointments Clause Confirm That the President's Recess Appointment Authority Extends to All Vacancies That Exist During a Recess.

As noted above, the Recess Appointments Clause provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. Consistent with the Clause's purpose to enable the President to ensure the smooth functioning of government by continuing to fill vacancies when the Senate is unable to provide its advice and consent, "both the courts and the Executive Branch have consistently construed the recess clause as giving the President the authority to fill all vacancies that exist while the Senate is in recess," regardless of when the vacancy arose. *United States v. Woodley*, 751 F.2d 1008, 1013 (9th Cir. 1985); *see* Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 576-77 n.16 (2012) (noting that "[s]ince [1823], the overwhelming mass of actual practice has supported the broad view").

Any other interpretation would leave the President unable to fill an office, no matter how important, for nearly a year if the vacancy arose right before the start of a lengthy recess, even an inter-session one. *See* 1 Op. Att'y Gen. at 632 (raising the hypothetical of a vacancy that occurs "on the last day of the Senate's session," so that the President does not even know about it before "the Senate rises" which cannot then be filled even

though "the public interests may imperiously demand that it shall be immediately filled"); *id.* at 633 ("whether it arose during the session of the Senate, or during their recess, it equally requires to be filled"); *see also United States v. Allocco*, 305 F.2d 704, 712 (2d Cir. 1962) (noting that limiting recess appointments to vacancies that arose during a recess "would create Executive paralysis and do violence to the orderly functioning of our complex government").

The court below held (and Respondent now argues) that the text of the Recess Appointments Clause nonetheless forecloses this understanding because, in large part, it would render "the operative phrase 'that may happen' . . . wholly unnecessary." Pet. App. 36a; *see* BIO 23. Then, having assumed that its "logical analysis" of the language was correct, the court simply sought to determine whether its understanding of the language was "consistent with the understanding of the word contemporaneous with the ratification." *Id.* This analysis is wrong on both counts. To start, as the Government explained in its petition, the phrase "that may happen" ensured that a President could not fill up *future* vacancies—for example, ones that had been announced, but not yet occurred—during a recess. Pet. 27. Such an action would, of course, be entirely inconsistent with the purpose of the Clause because the Senate would be available to offer its advice and consent at the point when those vacancies needed to be filled.

Moreover, the text plainly does not compel the conclusion that the court below reached. To the

contrary, "[i]n a vacuum, the use of the word happen could be interpreted to refer to vacancies that either 'happen to occur' or 'happen to exist' during a recess of the Senate." *Woodley*, 751 F.2d at 1012. In other words, "[a] vacancy in an office . . . can be understood to 'happen' either at the moment that the prior occupant left, or to 'happen' the entire time that the office or room is unoccupied." Hartnett, *supra*, at 383; *see* 12 Op. Att'y Gen. 32, 34 (1866) ("The subject-matter is a *vacancy*. It implies duration, a condition or state of things which may exist for a period of time. Can it be said that the word *happen*, when applied to such a subject, is only properly applicable to its beginning?" (emphasis in original)). And this was as true at the time the Constitution was drafted as it is today. *See* Thomas Dyche & William Pardon, A New General English Dictionary 376 (1760) (defining "happen" to mean either "to come to pass" or "to be"); *see also* Pet. 26 (quoting 1775 definition of "vacancy" as meaning the "[s]tate of a post or employment when it is unsupplied"). The court below erred in considering only whether its view was consistent with contemporaneous understandings of the word "happen," rather than considering whether its view was the *only one* consistent with those understandings. This was too thin a reed to justify supplanting the long-settled practice under the Recess Appointments Clause. *See Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) (explaining that there is a "role [for] tradition in giving content only to *ambiguous* constitutional text" (emphasis in original)).

The history of the Clause also supports the interpretation that the presidential recess appointments power extends to vacancies that exist during a recess, even if they did not arise during that recess. As the Government notes, the Clause has been consistently interpreted to permit such recess appointments since at least 1823, and "some Executive Branch practice before 1823 was consistent with [this] view, including two recess appointments made by President Washington and one made by President Madison." Pet. 25 & nn.10-11 (internal footnote omitted); *see* Hartnett, *supra*, at 390 ("interpreting the Recess Appointments Clause to permit appointments when the vacancy first arose before the recess is not some later invention, but is older than, for example, *Marbury v. Madison*"). Again, the court below emphasizes that there was some disagreement of opinion on this point during the nation's early history, Pet. App. 38a-41a, but mere disagreement is not enough to carry the day when this interpretation would significantly undermine the purpose of the Clause, as previously discussed. *See supra* at 9-11.

The court below does not meaningfully grapple with that problem. It suggests that "Congress can address this issue" (Pet. App. 44a), but it does not explain why the Framers would have wanted the President to be able to fill vacancies that arose during a recess, but not ones that arose the day before a recess. Indeed, as the Government points out, at the Framing, "the President might not even have learned of such a vacancy until after the Senate's recess had begun." Pet. 26; *see* Strauss, *supra*, at 131 ("[n]ews of

vacancies occurring during a session might very well not even [have] reach[ed] the President until after the Congress had risen"). Nor does the court explain why the Framers would have wanted the constitutionality of recess appointments to turn on when exactly the vacancy arose, a fact that would often have been difficult to determine at the time of the Founding, *see* Hartnett, *supra*, at 397 (noting the "difficulty in ascertaining" when certain vacancies arose), rather than whether it existed at the time of the recess. Only by looking at whether the vacancy existed at the time of the recess is it possible to make sense of the text, history, and purpose of the Recess Appointments Clause.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
*Counsel of Record
BRIANNE J. GOROD
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org
Counsel for Amicus Curiae

May 28, 2013

AMICUS CURIAE BRIEF

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No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF SENATE REPUBLICAN LEADER MITCH McCONNELL AND 44 OTHER MEMBERS OF THE UNITED STATES SENATE AS *AMICI CURIAE* IN SUPPORT OF CERTIORARI

MIGUEL A. ESTRADA
Counsel of Record
JONATHAN C. BOND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Amici Curiae

Law[illegible]

QUESTION PRESENTED

Whether the President lawfully exercised his authority under the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, when he purportedly appointed three individuals to be Members of the National Labor Relations Board on January 4, 2012.

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BRIEF OF SENATE REPUBLICAN LEADER MITCH McCONNELL AND 44 OTHER MEMBERS OF THE UNITED STATES SENATE AS *AMICI CURIAE* IN SUPPORT OF CERTIORARI

INTEREST OF *AMICI CURIAE*

Amici curiae are Senate Republican Leader Mitch McConnell and 44 other members of the United States Senate (listed in Appendix B). As members of the Senate, *amici* have an unparalleled interest in safeguarding the chamber's constitutionally prescribed role in the appointments process, which the Executive here sought to circumvent. Particularly given Senate rules and practices providing members of the minority party a meaningful role in the chamber's consideration of appointments, *amici* have a powerful stake in ensuring that the Executive's assertion of a unilateral power to appoint federal officers—which the Framers deliberately withheld—is repudiated. *Amici* also have an unmatched interest in preserving the chamber's constitutional authority to govern its own proceedings, which the Executive also attempted to override. *Amici* therefore have a strong interest in assisting in the Court's full consideration of all issues presented in the case.[1]

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission. Counsel of record for all parties received timely notice of *amici*'s intent to file this brief and consented to its filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with Petitioner National Labor Relations Board (and Respondent Noel Canning) that this case presents an issue of great importance that warrants this Court's attention. Indeed, the stakes for the separation of powers are much greater than the Executive lets on. The petition's portrayal of the dispute as concerning only the scope of the President's power to fill vacancies when the Senate is absent omits a crucial component of the case: When the President made the purported recess appointments to the Board on January 4, 2012, the Senate was *not* in "the Recess," even by the Executive's own longstanding definition. Quite the contrary, between December 17, 2011, and January 23, 2012, the chamber held regularly scheduled sessions every three days, at which it could (and did) conduct any legislative business it chose, by unanimous consent, up to and including passing legislation. Until now, the Executive itself—including this Administration, in this Court—has agreed that by doing so, the Senate remains in "Session," foreclosing recess appointments.

The petition elides this critical fact, thus distorting the issue the case actually presents and concealing its true implications for the constitutional structure. By purporting to appoint principal officers unilaterally while the Senate was sitting, the President usurped two powers that the Constitution confers explicitly, and exclusively, on the Senate. Article II gives the chamber an absolute veto over appointments, U.S. Const. art. II, § 2, cl. 2, except for inferior officers Congress itself exempts and temporary appointments to fill vacancies that "happen dur-

ing the Recess of the Senate," *id.* art. II, § 2, cl. 3. And Article I vests the Senate alone with authority to prescribe its own rules and procedures. *See id.* art. I, § 5, cl. 2. That includes, *inter alia*, setting its own schedule (with few exceptions)—when and how to hold sessions, and when and for how long to adjourn—and prescribing how the attendance of a quorum will be ascertained (and if needed, compelled, *id.* art. I, § 5, cl. 1). And as this Court has long held, each House's official account of its actions is generally controlling.

By making principal-officer appointments without the Senate's approval—when the chamber decided *not* to "Recess," but instead held regular meetings, as its records attest—the President claimed both of these bedrock Senate powers for himself. Indeed, the Executive has maintained that the President may deem the Senate in a de facto "Recess" whenever in *his* view it is "unavailable" (C.A. Respondent's Br. 61) to confirm his nominees. And the President himself made clear how elastically he interprets 'availability': He admittedly resorted to recess appointments in January 2012 not because the Senate was *unable* to give an answer on nominations, but because he did not like the answer he received.

The petition thus is correct that review of this *case* warrants review by this Court. Whether the President may evade the advice-and-consent protocol at his pleasure and override the chamber's procedural determinations undoubtedly presents an "an important question of federal law" that "should be" definitively "settled by this Court." Sup. Ct. R. 10(c). To be sure, the court of appeals, faithfully adhering to the constitutional text, structure, and history, correctly repudiated the President's power-grab, reject-

ing the Executive's starting premise that intrasession recess appointments to preexisting vacancies are *ever* valid, let alone when no "Recess" by any plausible definition occurred. Only weeks ago, the Third Circuit likewise rejected the Executive's theory. But the Executive's ongoing defiance of the decision below and its inevitable expansion on this latest encroachment make a ruling from *this* Court necessary.

The Board, however, fails to mention this central aspect of the dispute; one cannot tell from the petition that the Senate's powers are implicated at all. The Board instead tenders two abstract questions decoupled from the actual appointments invalidated below and their context. Those two questions indeed warrant this Court's attention, but only as *part* of the Court's plenary review of the appointments' legality—not in artificial isolation from the rest of the case. The Board's attempt to divide and circumscribe the issues is illogical, and ultimately futile. As the Third Circuit's ruling illustrates, one cannot interpret "the Recess of the Senate" without confronting whether it includes *any* break in Senate business when the President expects his nominees will not be confirmed with alacrity, as the Executive evidently believes, or instead has some fixed meaning, which prevents the recess-appointments exception from swallowing the rule. In any event, Noel Canning and *amici* would be entitled to urge affirmance of the judgment below on any basis supported by the record; the Board's incomplete framing of the issue thus serves only to confuse and mislead.

Moreover, confining the Court's focus, as the Board proposes, to the issues the petition identifies would be counterproductive. Even a ruling for the

Board on both questions it tenders could not save the appointments; they still would be unlawful, and at minimum the "constitutional cloud" (Pet. 31) would hover over this and other agencies for months or years more. A decision that the President *cannot* unilaterally declare the Senate in "Recess" against its will, in contrast, could render resolution of those broader questions unnecessary here.

Amici therefore agree that the Court should decide the validity of the January 2012 appointments. But it should consider that question in its entirety, with all antecedent and subsidiary issues on the table, unconstrained by the Board's selective presentation of the dispute.

ARGUMENT

I. THE VALIDITY OF THE PURPORTED RECESS APPOINTMENTS TO THE BOARD PRESENTS AN ISSUE OF EXCEPTIONAL IMPORTANCE.

A. There is no dispute that the purported January 2012 recess appointments to the Board present a momentous constitutional question. The President's claimed authority to name principal federal officers without the Senate's consent while the chamber has declared itself in session has no basis in the Constitution, and if credited would severely and irreparably undermine the separation of powers.

1. The Framers, understandably wary of potential "'manipulation of official appointments'" by the Executive, *Freytag* v. *Comm'r*, 501 U.S. 868, 883 (1991) (citation omitted), deliberately withheld from the President the ability to appoint officers unilaterally—save for certain inferior officers, and then only with Congress's blessing. *See* The Federalist No. 76, at 455-56 (A. Hamilton) (Clinton Rossiter ed., 2003).

Requiring the Senate's approval of appointments, they recognized, would "serv[e] both to curb Executive abuses of the appointment power and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Edmond* v. *United States*, 520 U.S. 651, 659 (1997) (citations omitted; second alteration in original). The Framers accordingly gave the Senate not merely a voice regarding appointments, but an absolute veto, making its "Advice and Consent" a condition precedent to a commission. U.S. Const. art. II, § 2, cl. 2.

The President bypassed that advice-and-consent protocol in making the purported January 2012 appointments to the Board, wielding the very unilateral appointment power that the Framers withheld. He invoked as authority the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, but its text and purpose contradict his claim. The President's power under that Clause is entirely conditional; it arises *only if* the Senate itself chooses to end its "Session" and begin its "Recess," thus rendering itself unavailable to act on appointments. *Ibid.* The appointments here, however, were not made—and the vacancies they filled did not "happen"—during "the Recess of the Senate," but instead during a period while the Senate repeatedly held public sessions. Since it first asserted power to make intrasession recess appointments, the Executive has maintained that *at minimum* the chamber is not in "the Recess" when it has adjourned within a "Session" for three days or fewer—reflecting the Constitution's provision that such short breaks do not require even the House's consent, *id.* art. I, § 5, cl. 4. *See Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 24-25

(1921).[2] This Administration reiterated that view three years ago in this Court, Respondent's Letter Br. 3, *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635 (2010) (No. 08-1457) (Senate "may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over a lengthy period"), and concedes as much even now, Pet. 21.

When the President purportedly made the January 2012 appointments to preexisting Board vacancies, the Senate had done just that: From December 17, 2011, until January 23, 2012, it held scheduled sessions every three business days—including on January 3 and 6, one day before and two days after the January 4 appointments, respectively.[3] Even by the Executive's long-held definition of "the Recess of the Senate," therefore, the Senate was not in "Recess" when the putative appointments (or the vacancies they supposedly filled) occurred. The appointments thus cannot be justified by the Senate's supposed inability to act. Indeed, the President himself justified another recess appointment allegedly made on January 4 not on the ground that the Senate was

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[2] *See also Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __, slip op. at 9 n.13 (Jan. 6, 2012), http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf ("2012 OLC Opinion") (all Internet materials last visited May 24, 2013) (noting Executive's prior recognition of three-day limitation); *cf.* Reply Brief for Intervenor United States 21, *Evans* v. *Stephens*, 407 F.3d 1272 (11th Cir. 2005) (en banc) (No. 02-16424), 2004 WL 3589822, at *21 ("[I]t would make eminent sense, in constructing any *de minimis* exception from otherwise applicable constitutional rules for 'recess,' to apply the three-day rule explicitly set forth in the Adjournment Clause.").

[3] 157 Cong. Rec. S8783, 8783-84 (Dec. 17, 2011); 158 Cong. Rec. S1 (Jan. 3, 2012); 158 Cong. Rec. S3 (Jan. 6, 2012).

unavailable, but to circumvent Senate opposition: In his own words, he "refuse[d] to take no for an answer."[4]

2. The Executive sidestepped the Senate's explicit determination *not* to "Recess" from December 17, 2011, to January 23, 2012, by declaring that the sessions it held did not count, and the chamber was therefore in the midst of a "20-day recess."[5] Pet. 6; *see* 2012 OLC Opinion at 9-23; C.A. Respondent's Br. 11-12, 23, 31, 34-48. But the Constitution gives the *Senate*, not the President, the final say on when it is and is not in session. By disregarding the Senate's determination, the Executive seized for itself the chamber's authority to prescribe and administer its own procedures.

a. Article I empowers "[e]ach House" of Congress to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. As this Court has long held, the choice of each chamber's rules and procedures is for the members of that House alone. Unless a procedure flouts the Constitution or "fundamental rights," or is incompatible with reason, the Senate's discretion is "absolute." *United States* v. *Ballin*, 144 U.S. 1, 5 (1892). And the Senate's interpretations of rules and procedures it has adopted deserve "great weight." *United States* v. *Smith*, 286 U.S. 6, 33 (1932).

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[4] 2012 Daily Comp. Pres. Docs. No. 00003, at 3 (Jan. 4, 2012).

[5] The Executive contends that there were "two adjacent intrasession recesses," one before January 3 and one after, on the puzzling theory that the Senate's Second Session of the 112th Congress automatically began on January 3 by operation of law under the Twentieth Amendment *whether or not* the chamber met that day. C.A. Respondent's Br. 31 n.11.

As the earliest commentators understood, that authority includes—subject to few limitations—how and when to hold sessions and when to adjourn. *See, e.g.*, Thomas Jefferson, *Opinion on the Constitutionality of the Residence Bill* (July 15, 1790), *reprinted in* 17 *The Papers of Thomas Jefferson* 194, 195 (1965). Indeed, even the "humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 835, at 298 (1833). The only external constraints on the Senate's schedule are modest and specifically enumerated: It must meet once a year on January 3 (or another date Congress chooses), U.S. Const. amend. XX, § 2, and when called into special session by the President, *id.* art. II, § 3. And once convened, the Senate cannot adjourn for more than three days (or to another place) without the House's consent. *Id.* art. I, § 5, cl. 4. Only if the House and Senate disagree does the President play any role in adjournments. *See id.* art. II, § 3; *id.* art. I, § 7, cl. 3 (excluding adjournment resolutions from presentment requirement).

As this Court has long recognized, moreover, the Senate not only may prescribe when it will meet, but *also* has the final word regarding whether it has done so. Congress's official record of its activities is generally not open to debate. Either chamber's representation that it passed a bill, for example—through the attestation of its presiding officer who signed it—is controlling. *See Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 670-80 (1892). The other branches have even *less* basis to question whether a scheduled Senate meeting actually occurred, or whether a quorum attended. Article I empowers each chamber to establish procedures for determin-

ing whether a quorum is present and, if necessary, to compel absent members' attendance. *See Ballin*, 144 U.S. at 5-6; U.S. Const. art. I, § 5, cl. 1. Unless those procedures exceed other constitutional limits or are utterly irrational, they, like "all matters of method[,] are open to the determination of the house," whose authority is "absolute and beyond the challenge of any other body or tribunal." *Ballin*, 144 U.S. at 5. The Executive's conjecture that "some other way would be better, more accurate or even more just" is entirely irrelevant. *Ibid.*

That deeply rooted principle refutes the Executive's claim that the President could deem the Senate adjourned when he made the January 4, 2012, appointments. The Senate itself determined that it would meet on the record on January 3, 6, and other days, 157 Cong. Rec. at S8783-84, and its records confirm that it did so, *see, e.g.*, 158 Cong. Rec. at S1, S3; S. Journal, 112th Cong., 2d Sess. 1-2 (2012). Whether a quorum was present was, under *Ballin*, 144 U.S. at 5, for the Senate alone to determine, and no determination was made that one was lacking. The President thus was powerless to proclaim the Senate's sessions nullities. By doing so, he claimed for himself the authority to dictate Senate procedure and to supplant the Senate's account of its actions with his own.

b. Even if the Senate's own determination that it was in session were not controlling, the Executive had no basis to question it here. The only ground it has ever asserted to impugn the validity of the December 2011–January 2012 sessions is that the order scheduling them labeled them "pro forma . . . with no business conducted." 157 Cong. Rec. at S8783; *see* C.A. Respondent's Br. 35-47; 2012 OLC Opinion at 9-

23. But that description bears only on the Senate's *intentions* whether to do business, not its *ability* to do so. Notwithstanding that proviso, adopted by unanimous consent, under Senate Rules the chamber nevertheless could choose, by the same unanimous-consent procedure, to conduct business, even "without notice." Senate Rule V(1), *Senate Manual*, S. Doc. No. 112-1, at 5 (2011). That is hardly extraordinary; unanimous consent is the method by which *most* Senate business is done, including passing laws and confirming nominees. Any doubt that the Senate could act during its pro forma sessions, moreover, was eliminated by the fact that in the five months before the January 4 appointments, the chamber twice *passed legislation* by unanimous consent (that the President signed into law) during identical pro forma meetings—once in the same series of sessions as the January 3 and 6 meetings, at the President's own urging.[6] *See NLRB* v. *New Vista Nursing & Rehab.*, __ F.3d __, 2013 WL 2099742, at *19 (3d Cir. May 16, 2013).[7]

The Executive itself, in fact, has long accepted pro forma sessions as equivalent to any other. Such sessions historically have been used by both Houses

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[6] *See* 157 Cong. Rec. S5297 (Aug. 5, 2011) (passing Public Law No. 112-27, 125 Stat. 270 (2011)); 157 Cong. Rec. S8789 (Dec. 23, 2011) (passing Public Law No. 112-78, 125 Stat. 1280 (2011)); *see also* 2011 Daily Comp. Pres. Docs. No. 00962, at 1-2 (Dec. 22, 2011) (urging Senate, which had already commenced pro forma sessions, to pass Public Law No. 112-78).

[7] As *New Vista* explained, the Executive's argument for disregarding pro forma sessions also proves too much: It would allow recess appointments even during "day-to-day adjournments," "eviscerat[ing] the divided-powers framework the two Appointments Clauses establish." 2013 WL 2099742, at *19-20.

to satisfy other constitutional provisions—including the Adjournments Clause, U.S. Const. art. I, § 5, cl. 4, which forbids either house from "adjourn[ing] for more than three days" without the other chamber's consent, and the Twentieth Amendment, which requires each House to meet at least once a year on January 3, *id.* amend. XX, § 2.[8] The Executive has never questioned those practices. And it has accepted pro forma sessions as valid when it suits its interests—for example, in applying federal statutes that measure Congress's time to override executive action by Senate session days.[9] Indeed, until now, it has recognized pro forma sessions as valid for purposes of the Recess Appointments Clause *itself*. In 2010, it represented to this Court that "the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007," Respondent's Letter Br. 3, *New Process Steel*, 130 S. Ct. 2635 (No. 08-1457)—*including* periods in which it held only pro forma sessions for weeks on end, *see* Joint Comm. on Printing, 112th Cong., *2011-2012 Congressional Directory* 537 (2011).

3. The January 2012 appointments thus doubly intrude on Senate prerogatives and arrogate to the Executive powers the Framers reserved to the chamber. Such unprecedented self-aggrandizement, if allowed to stand, would radically reshape the constitutional structure and irrevocably upset the careful balance the Framers struck.

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[8] *See* 2012 OLC Opinion at 18-19 & n.25; Christopher M. Davis, Cong. Research Service, *Memorandum: Certain Questions Related to Pro Forma Sessions of the Senate* (2012), *reprinted in* 158 Cong. Rec. S5954, S5955 (Aug. 2, 2012).

[9] *See* Davis, *Memorandum*, *supra*, at S5955-56.

The practical consequences of that claim, if credited, are equally unsettling. If the President can declare the Senate "unavailable" simply because he does not believe it will swiftly rubber-stamp his nominations—here he waited less than *three weeks* for Senate approval of two nominees before resorting to recess appointments, *see* 157 Cong. Rec. S8691 (Dec. 15, 2011)—then "Advice and Consent" will become a dead letter; he could fill federal offices for up to two years whenever he concludes the Senate is unreceptive, or just too busy. And if he can override Senate procedures and second-guess its account of its actions, there is no telling what mischief he can achieve: He might purport to issue pocket vetoes while the chamber is sitting, for example, or refuse to enforce bills he disapproved because he declines to credit Congress's representation that it enacted the bill over his veto. The stakes of the dispute thus amply justify this Court's review of the legality of the January 2012 appointments.

B. The court of appeals here, of course, did *not* credit the President's claim of power, but instead repudiated the unlawful January 2012 appointments. Pet. App. 17a-52a. In a meticulous, scholarly opinion, the court below scrutinized the relevant constitutional text, the historical record, and the structural implications of the Executive's assertion of authority, concluding that the January 2012 appointments were invalid and that the Board's action giving rise to this case was "void." *Id.* at 52a. And two weeks ago, the Third Circuit reached the same conclusion regarding an earlier recess appointment to the Board, holding that intrasession appointments are unconstitutional and explicitly rejecting the Executive's contention that the President may unilaterally disregard pro forma sessions. *See New Vista*, 2013

WL 2099742, at *11-30. Both courts' holdings are faithful to the Constitution and should not be disturbed. Yet despite the absence of any error to correct, this Court's review is nevertheless appropriate given the Executive's ongoing defiance of the decision below and its inevitable attempts to evade that ruling in the future.

1. The Executive has made clear that it considers the court of appeals' opinion merely advisory—even with respect to the Board itself. Notwithstanding the D.C. Circuit's categorical holding that the purported January 2012 appointments are invalid and that the Board thus lacks the quorum needed to act, *see* Pet. App. 2a, 35a, 52a; *cf. New Process Steel*, 130 S. Ct. at 2644-45, the Board has publicly declared, with the Executive's explicit blessing, that the decision below "applies to only one specific case" and has no bearing on the Board's ability to act in others.[10] The Board also has suggested that it can continue acting in other cases despite the decision below because, even though private parties can seek review of Board actions in the D.C. Circuit, the Board itself can seek enforcement of its orders *else-*

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[10] NLRB, Statement by Chairman Pearce on Recess Appointment Ruling (Jan. 25, 2013), http://www.nlrb.gov/news-outreach/news-releases/statement-chairman-pearce-recess-appointment-ruling ("Pearce Statement"); White House, Press Briefing by Press Secretary Jay Carney (Jan. 25, 2013), http://www.whitehouse.gov/the-press-office/2013/01/25/press-briefing-press-secretary-jay-carney-1252013 (D.C. Circuit's decision "does not have any impact . . . on [the Board's] operations or functions, or on the board itself").

where.[11] So long as a single Circuit will entertain its arguments, in other words, the Board evidently is content to bury its head in the sand and pretend that the decision below does not exist. That approach has nothing to support it. The Board cannot fairly benefit from the principle exempting federal agencies from nonmutual estoppel, which exists to foster "development of important questions of law" and ensure that "several courts of appeals" can "explore a difficult question before this Court grants certiorari," *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984), since a central premise of the petition is that a circuit conflict *already* has developed, *see* Pet. 11-12, 23-24, 31.

Nevertheless, on these dubious grounds, the Board has pledged to "continue to . . . issue decisions" and take other actions that by law require a quorum, despite a federal court's determination that it lacks authority to do so.[12] True to its word, in just the two months *since* the court of appeals' mandate issued, *see* C.A. Docket, No. 12-1115 (D.C. Cir. Mar. 20, 2013), the Board has pressed on and issued more than *forty* published decisions (more than *one hundred* altogether).[13] Until this Court rules definitively on the January 2012 appointments, the Board's ultra vires operations undoubtedly will continue.

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[11] *See* Respondent's Opp. 7, 19-21, 27, *In re SFTC, LLC*, No. 13-1048 (D.C. Cir. Apr. 10, 2013); *cf. Bloomingdale's, Inc.*, 359 NLRB No. 113 (2013).

[12] Pearce Statement, *supra*.

[13] *See* NLRB, Board Decisions, http://www.nlrb.gov/cases-decisions/board-decisions; NLRB, Unpublished Board Decisions, http://www.nlrb.gov/cases-decisions/unpublished-board-decisions.

2. Given the Executive's willingness to disregard the decision below even with respect to the agency that was a party to the case, there is little doubt that until its abuses are put to an end once for all by this Court, they will continue and spread to other areas. Any claim by the Executive that the circumstances of the January 2012 appointments are somehow *sui generis*, and that recess appointments will not become commonplace whenever nominees face the slightest opposition, deserves zero credence given the Executive's track record of abandoning limitations on recess appointments that past Administrations have accepted as valid.

Indeed, the only constant in more than two centuries of Executive practice under the Recess Appointments Clause is that *no* limitation on the President's power—however solemnly embraced by his predecessors—will be honored if the Executive later finds it too bothersome to obey.

- The first Attorney General (and Committee of Detail alumnus), Edmund Randolph, forswore recess appointments to fill vacancies that arose before the recess in which the appointments are made, which he concluded were incompatible not only with the text, but also the "Spirit of the Constitution." Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), *reprinted in* 24 *The Papers of Thomas Jefferson* 165, 166 (1990). But that barrier was later discarded by Randolph's successors when it proved an impediment to Executive policy. *See Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. 631, 632-34 (1823).

- For nearly a century *after* abandoning Randolph's well-reasoned view, the Executive (ar-

guably aside from the troubled Andrew Johnson Administration) continued to disavow authority to make intrasession recess appointments. *See President—Appointment of Officers—Holiday Recess*, 23 Op. Att'y Gen. 599, 603 (1901). But that limitation likewise became optional when it stood in the way. *See* 33 Op. Att'y Gen. at 21-25.

- For another nine decades—continuing not only into this century, but into this Administration—the Executive disclaimed power to make intrasession recess appointments in between Senate meetings scheduled three or fewer days apart, including "pro forma" sessions of the type held in January 2012. *See supra* at 6-7, 11-12. Yet less than two years later, those assurances were abandoned when honoring them proved inconvenient. *See* 2012 OLC Opinion at 9-23; C.A. Respondent's Br. 35-48.

The lesson of history, in short, is that there is *no* line the Executive will not cross. Each generation of Presidents will push the envelope as far as necessary to suit the political expediency of the moment.

The Executive's more specific assurance that it will not rely on recess appointments to evade advice and consent (Pet. 22) and can be trusted to use them responsibly is even less credible. The Board's own account of the massive number of recess appointments made in recent decades during intrasession breaks and to already-extant openings (*see id.* at 11-12, 17-18, 30) is a testament to the crutch that they have become. The Board's claim that "Presidents routinely seek Senate confirmation when filling vacant offices" (*id.* at 22) offers chilling comfort. To be sure, in the past two Administrations, nearly all re-

cess appointees themselves previously were nominated to their posts (usually several months earlier).[14] But that if anything confirms that recess appointments *have* become a means to sidestep Senate confirmation. In any case, the President himself has made clear that he will resort to recess appointments, and indeed *has done so*, precisely to circumvent perceived Senate opposition.[15]

Worst of all, in the absence of a definitive judicial repudiation of its ever-expanding position, the Executive inevitably will seize on the Senate's failure to prevent (by unknown means) further encroachment as *acquiescence* in the President's view of his power. Administrations past to present have twisted even statutes enacted to curtail unlawful appointments and Senate committee reports sharply reproaching the Executive for its recess-appointment abuses into evidence of tacit assent. *See* Pet. 16-17; 2012 OLC Opinion at 7; *Recess Appointments*, 41 Op. Att'y Gen. 463, 466 (1960); 33 Op. Att'y Gen. at 24. Nothing short of a final ruling from this Court will bring the Executive's self-aggrandizement to an end.

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[14] *See* Henry B. Hogue & Maureen Bearden, Cong. Research Service, R42329, *Recess Appointments Made by President Barack Obama* 7 (2012); Henry B. Hogue & Maureen Bearden, Cong. Research Service, RL33310, *Recess Appointments Made by President George W. Bush, January 20, 2001-October 31, 2008*, at 3-5 (2008).

[15] 2012 Daily Comp. Pres. Docs. No. 00003, at 3.

II. THIS COURT'S REVIEW OF THE PURPORTED RECESS APPOINTMENTS SHOULD INCLUDE ALL ASPECTS OF THE APPOINTMENTS' VALIDITY.

Although the Board is correct that review of this *case* is appropriate, its characterization of the issue warranting this Court's review is misleadingly incomplete. The question that is squarely implicated by the facts of the case, that was briefed and decided below (*e.g.* Pet. App. 17a), and that merits this Court's attention now is whether the purported January 2012 appointments were lawful exercises of the President's power under the Recess Appointments Clause. Unless the appointments were valid, the Board undisputedly lacked statutory authority, under 29 U.S.C. § 153(b) and *New Process Steel*, 130 S. Ct. at 2644-45, to issue its decision in the underlying labor dispute that is the subject of this litigation. Regardless of one's view of the legality of the January 2012 appointments, the question of their validity undeniably is important and merits review.

A. The Board, however, does *not* ask this Court to decide that fundamental question. Instead, it vainly attempts to confine the Court's focus to two subsidiary, theoretical issues that, even taken together, capture only a part of the constitutional controversy: whether intrasession recess appointments, and recess appointments to preexisting vacancies, can *ever* be valid. Pet. i. And it urges the Court to pass on those abstract propositions *without* deciding whether the appointments at issue were actually lawful—indeed, without any reference to these specific appointments or their context. That approach directly contradicts the Board's position below, where it explicitly framed the only recess-appointments issue in terms of these *particular* appointments. *See*

C.A. Respondent's Br. 2 (stating recess-appointments issue as "[w]hether the President's recess appointments of three Board Members during a 20-day period in which the Senate had declared by order that no business would be conducted occurred within a 'Recess of the Senate' under the Constitution's Recess Appointments Clause").

More importantly, the petition's myopic approach makes no sense. The two issues that the Board frames for review are not in fact discrete constitutional *questions* separate from the validity *vel non* of the January 2012 appointments, but merely reflect two *reasons* why those appointments were unlawful. The ultimate question remains those appointments' legality. By attempting to constrict the Court's inquiry to the two particular grounds of invalidity addressed in the petition, however, the Board elides a critical aspect of that question: whether the President could override the Senate's decisions regarding its own internal procedure, by disregarding both the chamber's determination to meet on a certain day and its official records confirming that it did so. If the President lacked that power (and he did), then the appointments were unconstitutional, and the Board's action was ultra vires, *even if* intrasession appointments to preexisting vacancies could be lawful in other circumstances. The existence of that purported but unprecedented Executive power is thus central to the case. Yet the Board would have the Court bypass that issue altogether.

The Board offers no basis for that blinkered approach, and there is none. Indeed, its suggestion that the Court preemptively split the issue into subsidiary components and consider only *some* of them is illogical, and ultimately futile. Even considering

the Recess Appointments Clause's meaning in the abstract, the question of the President's claimed power to interfere in Senate procedure is unavoidable. The Board's own questions require construing the phrase "the Recess of the Senate." And unless that language refers, as the court below and the Third Circuit correctly held, *only* to intersession adjournments, the Court must discern what *other* breaks the Clause covers. It must confront whether the Clause encompasses interruptions of any length in Senate business, even overnight (or over lunch), or only breaks of some minimum duration, as until now the Executive itself recognized. *See supra* at 6-7. Even more importantly, as the Third Circuit's analysis illustrates, *New Vista*, 2013 WL 2099742, at *17-20, the Court would have to resolve whether, in measuring the length of such adjournments, the Executive can look behind the Senate's attestation that it is in session on certain days because in *his* view it is "unavailable" to act. If the Court's ruling interpreting the Clause is to provide any meaningful guidance to lower courts confronting recess-appointments disputes, addressing these key questions is inescapable. In any case, the Board's attempt to avoid these issues by skewing the questions presented cannot preclude this Court from affirming the judgment below on any basis supported by the record, nor can it prevent Noel Canning, which prevailed below, or its *amici* from urging the Court to do so. *See United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994). Framing the issue to exclude crucial aspects of the case, in short, achieves nothing but confusion.

B. Even taken at face value, the Board's request that the Court artificially restrict its analysis at the outset to the two issues cherry-picked by the petition

would frustrate rather than facilitate the Court's review. To be sure, the Court could affirm the D.C. Circuit's decision on either of the grounds it articulated, each of which amply suffices to support the judgment. But the Court might instead conclude that the validity of the January 2012 appointments should be resolved on narrower grounds specific to these circumstances—not least of which is that the President was powerless to proclaim the Senate adjourned when it said otherwise. The Board's proposal thus would not sharpen the Court's focus on the key issues, but would achieve the opposite by prematurely taking salient issues off the table before they have even been briefed.

Moreover, limiting the Court's review as the Board urges would undercut the Board's own objective of "remov[ing]" the "constitutional cloud" that hangs over it and other agencies. Pet. 31. While a ruling against the Board on *either* ground articulated by the decision below *or* on the basis that the President cannot disregard Senate sessions would independently invalidate the appointments and compel affirmance, even a ruling for the Board on *both* issues tendered in the petition would not save them. The question whether the President may unilaterally declare the Senate "unavailable" and thus in Recess would remain. Resolving that question, on which the Board has lost in one court of appeals already, inevitably would require further proceedings in the D.C. Circuit and potentially in this Court. The ensuing appellate ping-pong game would prolong the costly uncertainty that already burdens the many individuals, businesses, and others whose cases are or will be pending before the Board (or a reviewing court) or who face the threat of imminent Board action. The shadow cast over the Board—and any other agency

whose head was appointed by the same illegitimate means—would linger for months or years after this Court's decision.[16] That is a great loss, not a gain, for fairness and efficiency. The Court can and should avert that outcome by resolving the validity of the January 2012 appointments now, including *all* of the aspects of that question that are properly presented.

CONCLUSION

The petition for a writ of certiorari should be granted to consider whether the purported January 4, 2012, recess appointments were lawful.

Respectfully submitted.

MIGUEL A. ESTRADA
Counsel of Record
JONATHAN C. BOND
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Amici Curiae

May 28, 2013

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16 For example, the putative Director of the Consumer Financial Protection Bureau also received a recess appointment on January 4, 2012. White House, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012), http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts. That agency likewise would remain in limbo.

APPENDIX

APPENDIX A

The Constitution of the United States, Article I, Section 5, Clause 1 provides:

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

The Constitution of the United States, Article I, Section 5, Clause 2 provides:

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

The Constitution of the United States, Article I, Section 5, Clause 4 provides:

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

The Constitution of the United States, Article I, Section 7, Clause 3 provides:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

The Constitution of the United States, Article II, Section 2, Clause 2 provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Constitution of the United States, Article II, Section 2, Clause 3 provides:

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

The Constitution of the United States, Article II, Section 3 provides:

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

The Twentieth Amendment to the Constitution of the United States, Section 2 provides:

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

APPENDIX B

The following members of the United States Senate respectfully join the foregoing brief as *amici curiae*:

Senate Republican Leader Mitch McConnell

Senator Lamar Alexander

Senator Kelly Ayotte

Senator John Barrasso

Senator Roy Blunt

Senator John Boozman

Senator Richard Burr

Senator Saxby Chambliss

Senator Daniel Coats

Senator Tom Coburn

Senator Thad Cochran

Senator Susan M. Collins

Senator Bob Corker

Senator John Cornyn

Senator Mike Crapo

Senator Ted Cruz

Senator Michael B. Enzi

Senator Deb Fischer

Senator Jeff Flake

Senator Lindsey Graham

Senator Chuck Grassley

Senator Orrin G. Hatch

Senator Dean Heller

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-1281

MAY 2 8 2013

In The

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION
OF THE NOEL CORP., ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

AMICUS CURIAE BRIEF OF PROFESSOR VICTOR WILLIAMS IN SUPPORT OF PETITIONER

VICTOR WILLIAMS
Counsel of Record
Faculty Suite 480
COLUMBUS SCHOOL OF LAW
CATHOLIC UNIVERSITY OF AMERICA
Washington, D.C. 20064
(202) 319-5559
williamv@law.edu

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THRESHOLD QUESTION PRESENTED

In supplement to Petitioner's Questions Presented, Amicus proposes a threshold Question Presented, as follows:

> Whether challenge to the President's exercise of his exclusive Article II, Section 2, Clause 3 authority is a nonjusticiable political question.

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INTEREST OF THE AMICUS CURIAE

Victor Williams, of Catholic University of America's Columbus School of Law, writes, in support of the Petitioner's writ of certiorari, to raise an alternative political-question theory.[1] Professor Williams was granted leave to appear below as amicus in *Noel Canning v. NLRB* to raise the nonjusticiability alternative theory. He has also appeared as amicus in related cases before the Third Circuit and Seventh Circuit. Professor Williams has researched and published in the area of constitutional law and the federal appointments process for twenty-two years. Amicus' published scholarship and popular commentary has strongly supported the appointment prerogatives of four Presidents without regard to their party affiliation. Amicus has warned of worsening cycles of Senate confirmation dysfunction, and has been particularly critical of the recent purposeful appointment obstruction orchestrated by partisan factions of both the House and Senate. Throughout 2011, Professor Williams advocated for President Barack Obama to use his Article II, Section 2, Clause 3 appointment authority to challenge the appointment obstruction and insure legal authority for the National Labor

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[1] Pursuant to Rule 37.2(a), amicus provided timely notice of his intention to file this brief. All parties have consented. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the amicus, has made a monetary contribution to the preparation or submission of this brief. Amicus' institutional affiliation is provided only for identification purposes.

Relations Board (NLRB) and Consumer Financial Protection Bureau (CFPB). Amicus seeks to prompt a nonjusticiability inquiry during *certiorari* review, and argues for summary reversal of the court of appeals.

SUMMARY OF ARGUMENT

Without duplication, amicus fully endorses Petitioner's reasons for this Court to grant *certiorari* review. Amicus offers an alternative theory for both *certiorari* review and resolution: Respondent's challenge to the President's discretionary exercise of his recess appointment powers is a nonjusticiable political question.

Article II, Section 2, Clause 3 is a textual commitment of exclusive authority to the President. This textual commitment recognizes that only the Executive has the institutional competence to know when such discretionary appointment action is required to meet his Article II, Section 3 obligation: "[H]e shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States."

The textual commitment of authority grants the Executive both the responsibility to determine Senate unavailability and the discretion to sign temporary commissions. Alexander Hamilton explained in *Federalist 67* that Clause 3 is "intended to authorize the President *singly* to make temporary appointments." *The Federalist No. 67* at 455 (Alexander

Hamilton) (Jacob E. Cooke ed., 1961) (emphasis in original).

If this Court goes beyond the textual commitment of exclusive authority to the President, it will find itself entering the densest of modern political thickets. Cycles of partisan appointment obstruction and subsequent partisan payback have worsened over each of the past four presidencies. During the first years of the Obama Administration, partisan confirmation obstruction by minority factions reached unprecedented intensity.[2] The political and economic harm of appointment obstruction is significant. Executive departments critical to economic and national security interests have suffered years without leadership. Regulatory agencies have long-standing vacancies and the independent judiciary struggles with many empty benches and caseload emergencies.[3]

The express goal of the minority obstruction, particularly as directed against the 2011 NLRB and CFPB nominees, was nullification: Extinguish the independent agencies' legal authority by preventing

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[2] *See* Victor Williams and Nicola Sanchez, *Confirmation Combat*, Nat'l L.J. 34 (Jan. 4, 2010).

[3] *See* Russell Wheeler, *Is Our Dysfunctional Process for Filling Judicial Vacancies an Insoluble Problem?* ACS Issue Brief, Jan. 24, 2013, http://www.acslaw.org/sites/default/files/Wheeler_-_Filling_Judicial_Vacancies.pdf.

timely appointments.[4] The Senate's ongoing internal conflict has so escalated, and the lodging of holds and filibusters so frequent, that Majority Leader Harry Reid publicly praises the President for his recess appointments and requests that the President "recess appoint all" nominees being denied up-or-down votes by minority factions.[5]

If this Court's review goes beyond the exclusive textual commitment of authority to the President, it must also examine the constitutionality of the underlying obstruction. It would be a strange justice "to let a *minority* of the Senate escape judicial review of its arguably unconstitutional obstruction, while subjecting to judicial review the President's response – acquiesced in by the Senate majority – to that obstruction."[6] When a minority of just one Senator lodges a hold or a filibuster threat, the Appointment Clause's simple-majority Senate vote requirement is

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[4] *See* Ylan Q. Mui, *McConnell To Block 'Any Nominee' for Top CFPB Job*, Wash. Post, June 10, 2011, at A12; *see also*, Victor Williams, *NLRB and CFPB Recess Appointments: Obama's New Year's Options*, Huffington Post (Dec. 28, 2011), http://www.huffingtonpost.com/victor-williams/nlrb-and-cfpb-recess-appo_b_1169657.html.

[5] Seung Min Kim, *Senate Gridlocked Over Nominations, Again*, Politico, Feb. 17, 2012, http://www.politico.com/news/stories/0212/73038.html.

[6] Edwin Meese, III, et al., En Banc Amici Brief in *Evans v. Stephens*, 2004 WL 3589823, 9 (emphasis in original).

effectively amended to compel a predicate super-majority cloture vote.[7]

This Court would need to also examine the House majority and Senate minority scheduling collusion designed to withhold adjournment consent to the upper chamber for the purpose of keeping the Senate in pro forma sessions. With obstructionists promoting the myth that a three-day recess minimum was needed to trigger Clause 3 authority, prior sham Senate sessions had been used to bluff the Executive out of using the temporary appointment authority.[8] The specific objective of the 2011 scheduling gimmick was to block the President from responding to the prolonged confirmation tribulation of NLRB nominee Craig Becker. The President called the obstructionists' bluff, recess commissioned three Board members, including a replacement for Becker; thus restoring the legal authority of the NLRB.[9]

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[7] *See generally*, Tom Harkin, *Filibuster Reform: Curbing Abuse to Prevent Minority Tyranny in Senate*, 14 N.Y.U. J. Legis. & Pub. Pol'y 1 (2011); Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 Conn. L. Rev. 1041 (2011); and John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 Harv. J. L. & Pub. Pol'y 181 (2003).

[8] *See* Victor Williams, *Pro Forma Follies: Obama's Recess Appointment Authority Not Limited by Sham Sessions*, Nat'l L.J. 51 (Oct. 11, 2010); Victor Williams, *Averting a Crisis: The Next President's Appointment Strategy*, Nat'l L.J. 14 (Mar. 10, 2008).

[9] *See* Laurence H. Tribe, *Games and Gimmicks in the Senate*, N.Y. Times, A25, (Jan. 5, 2012) ("The Constitution that has guided our Republic for centuries is not blind to the threat of Congress's extending its internal squabbles into a general

(Continued on following page)

This adjudication is a direct continuation of the ongoing political conflict. In a bold frontal assault, congressional obstructionists appeared as amici and participated in oral argument below. This action attempts to draft the judiciary to actively participate in the political combat.

If this Court's review goes beyond the exclusive textual commitment to the President, it will find no judicially manageable standards to resolve the escalating campaign of appointment obstruction or to measure the deference due to the Senate, if any, when the President signs temporary appointments.[10] Judicial review of the President's recess appointment discretion is also disrespectful and conflictive; the judiciary should not be the final arbiter of the appointment method by which Presidents have strategically benched judges in order to transform courts.

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paralysis of the entire body politic, rendering vital regulatory agencies headless and therefore impotent. Preserving the authority the president needs to carry out his basic duties, rather than deferring to partisan games and gimmicks, is our Constitution's clear command.").

[10] A recent challenge to the Senate's use of the filibuster was analyzed as presenting a nonjusticiable political question based on the three *Baker* criteria argued in this brief. *Common Cause v. Biden*, 2012 WL 6628951 (D.D.C., Dec. 21, 2012).

ARGUMENT

Introduction: Political – Not Legal – Questions

Chief Justice John Marshall provided early guidance[11] regarding political-question nonjusticiability: "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury v. Madison*, 5 U.S. 137, 165 (1803). Marshall continued: "Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Id.* at 170. Throughout our Republic's history, this Court has recognized that some constitutional questions are committed by the Constitution to the discretion of the elected political Branches. *See, e.g.*, *Luther v. Borden*, 48 U.S. 1 (1849); *Pacific States Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Coleman v. Miller*, 307 U.S. 433 (1939); *Gilligan v. Morgan*, 413 U.S. 1 (1973).

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[11] Three years before his *Marbury* opinion, Congressman John Marshall provided earlier guidance when explaining to his House colleagues that some constitutional questions should only be answered by the elected political Branches. Without such a jurisdictional limit, the political departments "would be swallowed up by the judiciary." Speech of the Honorable John Marshall (Mar. 7, 1800), 18 U.S. app. note I, at 16-17 (1820) (cited by *The Political Question Doctrine and the Supreme Court of the United States* (Nada Mourtada-Sabbah and Bruce E. Cain eds., 25 n.10, 2007)).

Associate Justice Sonia Sotomayor most recently reiterated the fundamental jurisdictional principle as it has been developed in such modern cases as *Baker v. Carr*, 369 U.S. 186 (1962); *Goldwater v. Carter*, 444 U.S. 996 (1979) and *Nixon v. United States*, 506 U.S. 224 (1993). She described how "[t]he political question doctrine speaks to an amalgam of circumstances in which courts properly examine whether a particular suit is justiciable – that is, whether the dispute is appropriate for resolution by courts." *Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1431 (2012) (Sotomayor, J., concurring). In agreeing with the Court's holding that interpretation of a statute merely regulating a passport's contents did not present a political question, Justice Sotomayor focused on *Baker v. Carr* to emphasize the "demanding" inquiry required in a nonjusticiability analysis.

Baker serves as a helpful doctrinal guide for such inquiry as it numerates both classical and prudential strains of judicial abstention. The "separation of power function" is identified "as the common element among the many possible formulations of a political question." 369 U.S. at 210. *Baker* identified six characteristics "[p]rominent on the surface of any case held to involve a political question," including, as most relevant here, "a textually demonstrable constitutional commitment of the issue to a coordinate political department." 369 U.S. at 217. The doctrine also precludes judicial review of an issue where there is a "lack of judicially discoverable and manageable standards for resolving it," or when it is impossible

for the court to undertake "independent resolution without expressing lack of the respect due coordinate branches of government." *Id.*

Nixon v. United States applied *Baker* by instructing that a political question analysis begins with determining "whether and to what extent the issue is textually committed." 506 U.S. at 228.

The drafting, ratification, and structural logic of Article II, Section 2 prove that the textual commitment of temporary appointment discretion to the Executive is absolute. Additional interrelated prudential factors strongly support that nonjusticiable determination.

I. Textual Commitment to Executive Alone: Recess Appointment Power was Capstone of Framers' Design for Presidential Predominance in Appointments

Framing the 1787 Philadelphia debate regarding appointments were the unhappy experiences of most of the independent states, which had constitutions mandating that state legislatures appoint officials and judges. "The appointing authority which in most constitutions had been granted to the assemblies had become the principal source of division and faction in the states." Gordon Wood, *The Creation of the American Republic, 1776-1787*, 407 (1969). The Convention's delegates repeatedly considered, and ultimately rejected, all proposals to give the Congress as a whole, or, alternatively, the Senate alone, significant

appointment authority. *See Freytag v. Commissioner*, 501 U.S. 868, 904-08 (1991) (Scalia, J., concurring.); *Buckley v. Valeo*, 424 U.S. 1, 129 (1976) (per curiam).

A. Presidential Predominance in Appointments

As the state legislature appointment processes "had fallen easy prey to demagogues, provincialism, and factions," the 1787 Philadelphia Convention delegates "quickly accepted the desirability of a significant Presidential role in making federal appointments." Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* 18 (2003).

The Convention's final summer judgment was to grant the President a predominant authority over appointments while restricting the Senate to an advisory consent vote to principal officer nominations. The term "Advice" should be read as conjoined with its companion term "Consent"; the Senate advises the President only by its final consensual vote. Such a final vote remains only advisory as the President retains absolute discretion to decide whether to sign the commission.[12]

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[12] Contrary to a significant quantity of commentary arguing for an enlargement of the Senate's role beyond this textual grant, Professor John McGinnis supports an accurately narrow reading of "Advice and Consent" by both textual analysis and reference to early practice. *See* John O. McGinnis, *The President,*

(Continued on following page)

Obvious by the Recess Appointment Clause's structural logic and functional purpose, the Senate was to have no role in, or interference with, the signing of recess commissions.[13] A Senate unavailable to render advisory consent is unavailable to advise as to its availability. The two appointment clauses which separately issue a "shall have Power" charge to the President are the method for his Article II, Section 3 "take care" and "commission all officers" obligation.

In *Federalist* writings, Alexander Hamilton favorably described – with "particular commendation" – the creation of a strong appointment authority in the Executive "to promote a judicious choice of men for filling the offices of the Union." *The Federalist No. 76*, at 510-11 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). In explaining the Convention's final decision to restrict the Senate's role to a ratification vote, Hamilton explained that any legislative assembly's "systematic spirit of cabal and intrigue" was incompatible with appointment power. *Id.* at 510.

Hamilton contrasted appointment by a "single well-directed" person who would not "be distracted

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the Senate, the Constitution and the Confirmation Process: A Reply to Professors Strauss and Sunstein, 71 Tex. L. Rev. 633 (1993).

[13] Just as with temporary appointments for principal officers, the Senate has no advisory consent function regarding "inferior Officer" appointments once legislation vests appointment authority "in the President alone, in the Courts of Law, or in heads of Departments."

and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body." *Id.* at 511. While Hamilton promised that the Senate's advisory consent would serve as an "excellent check" on improper presidential favoritism, he too optimistically assumed "Senate co-operation" done in a "silent operation." *Id.*

Hamilton affirmed that the House of Representatives should have no appointment role. In *Federalist No. 77*, Hamilton felt obliged to take notice of a "scheme" advocated by "just a few" to give the House influence in the appointment process. *The Federalist No. 77* at 519 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton accurately predicted that House appointment involvement would manifest "infinite delays and embarrassments." *Id.*

B. Recess Appointment Authority as the Capstone of Presidential Predominance in Appointments

The capstone of the Philadelphia Convention's design to give the President a predominant authority in appointments came from North Carolina Delegate Richard Dobbs Spaight.[14] During the most critical

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[14] Richard Spaight is better known to legal history for communicating with James Iredell urging judicial restraint and judicial deference to the political Branches. *See Letter from Richard Dobbs Spaight to James Iredell* (Aug. 12, 1787), in 2 Life and Correspondence of James Iredell, at 168, 169-70 (Griffith J. McRee ed., 1858).

day of the long summer's many debates regarding appointments, the final accord was struck for ordinary appointments by restricting the Senate's role to simple-majority vote ratification. Spaight then moved to grant the President unilateral appointment authority when the Senate was unavailable to attend to its advisory consent duty. The delegates immediately and unanimously accepted the grant of exclusive term appointment authority for the President. 2 *The Records of the Federal Constitutional Convention of 1798*, 539 (Max Farrand ed., 1966).

Spaight's motion prompted no additional Convention debate; it was integral to the delegates' structural and functional design for Executive appointment authority. The appointment authority would remain vested and operable at all times for all purposes; regardless of the Senate's attendance to its duties. It was a "power of appointment lodged in a President . . . to be exercised independently, and not pursuant to the manipulations of Congress." *Freytag v. Commissioner*, 501 U.S. at 907 (Scalia, J., concurring).

C. Framers' Functional Efficiencies and Structural Limitations for Temporary Appointments: Allowing "Play in the Joints"

The core purpose of the 1787 Convention was to redesign the central government to better address the problems of a new nation. The Framers sought to remedy the chief institutional defect in the Articles of

Confederation by formally separating executive authority from the Congress. Edmund S. Morgan, *The Birth of the Republic: 1763-89*, 129-44 (3d ed. 1992). The Confederation Congress had failed badly in its attempts to administer the new Republic. Neither specially-constituted congressional committees nor congressionally-appointed administrators had been successful in executing the law. *Id.* at 123-28. Article II, Section 2 was drafted to provide effective and practical governance through a strong Executive with predominate authority over all principal officer and judicial appointments, and a sole temporary commissioning authority to always insure a fully staffed government and judiciary.

The Framers gave the Clause 3 appointment option generous functional efficiencies which are dependent on no Senate role and which allow no Senate interference. The temporary appointment lasts until the end of the next session without Senate ratification needed, or Senate revocation allowed, during that period. The Framers did not prohibit successive recess commissions.[15] Nor did they restrict the function or power of temporary officials.

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[15] Presidents have not infrequently made re-recess appointments. *See* 15 *Op. Off. Legal Counsel* 98 (1991) ("It is well-established that the President may make successive recess appointments to the same person.") (quoting Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, to C. Boyden Gray, Counsel to the President, at 2 (Nov. 28, 1989)).

The Framers did not include specificity to restrict the duration or type of Senate unavailability, or the timing of a vacancy occurrence necessary for the authority to be triggered. Rather, they charged the President with a broad authority to insure that the federal appointment method would always remain *adequate* to keeping a fully staffed government. Alexander Hamilton explained that the unilateral Executive authority was for those "cases to which the general method was inadequate." *The Federalist No. 67* at 455 (Cooke ed., 1961).

With such functional efficiencies, it is also important to consider limiting principles inherent in Clause 3's operation. Such limitation is first found in the duration of the appointment. A temporary term of up to 24 months, while significant, is less than a several-years' term of a confirmed departmental office, the many-years' term of an independent agency posting, or the life-tenure office and salary of a confirmed Article III judge. Other limitations are found in possible Senate pushback (e.g., strategically terminating its current session or withholding of confirmation cooperation). The Congress has many other ways and means of checking the President in the dynamic relationship between the political Branches. *See Zivotofsky v. Clinton*, 132 S. Ct. at 1441 (Breyer, J., dissenting).

The wisdom of the Framers' final judgment on appointments was that the Clause's efficiencies and limitations work together to allow what (recess-appointed) Associate Justice Oliver Wendell Holmes,

Jr. described as a requirement for constitutional government: "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Texas v. Pension*, 282 U.S. 489, 501 (1931).

II. *Nixon v. United States*: Applying *Baker*'s Classical and Prudential Factors

In *Nixon v. United States*, the Court rejected, as nonjusticiable, a debenched federal judge's challenge to the Senate's questionable exercise of its Article I, Section 3, Clause 6 "sole" duty to "try" all impeachments.

A. No Textual Limit: Refusing to Define "try" (or "the Recess")

The *Nixon* Court refused to review a procedurally problematic Senate impeachment trial process by "evidence committee." Only 12 senators heard live testimony while 88 senators avoided jury duty in favor of later having access to a cold record. All 100 Senators then voted – thumbs up or down. Hardly the Framers' vision of the upper legislative chamber transformed into the nation's High Court of Impeachment. Nevertheless, the Court determined that the textual commitment of authority to the Senate was absolute.

The Court refused to play sematic games: "[T]he word 'try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority

which is committed to the Senate." *Nixon*, 506 U.S. at 239. Similarly, the terms "the Recess" and "Vacancies that may happen" in the Recess Appointment Clause of Article II, Section 2, do not provide an identifiable textual limit on the exclusive authority which is committed to the President. The Recess Appointment Clause's textual commitment of exclusive authority to the President is of the same non-reviewable quality as that of the Impeachment Trial Clause to the Senate.

This Court should also readily determine that "there is no separate provision of the Constitution that could be defeated" by allowing the President "final authority" to utilize his temporary appointment authority. *Id.* at 237. It is important to underline that no individual rights claims are, or could be, presented by the Respondent's challenge.[16]

B. Conflicted-Out: Judiciary as Final Arbiter of "Important Constitutional Check" on Judiciary

From a prudential perspective,[17] Respondent's challenge presents a significant conflict-of-interest for

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[16] It remains an open question whether Judge Nixon's lawyer should have emphasized his individual rights claims (due process or attainder).

[17] The purest "prudential strain" of nonjusticiability abstention incubates in Alexander Bickel's *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 183-197 (1962); *see generally*, Fritz Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 Yale L.J. 517 (1966).

the judiciary. Although the instant challenge involves agency appointments rather than judicial, the nonjusticiability standard should be uniform as to all temporary appointments; the Framers chose not to have a distinct appointment process for judges and other officers. The Executive has frequently used the unilateral authority to fill Article III judgeships. More than 300 justices and judges have risen to the federal bench by recess commission, including such notable jurists as Oliver Wendell Holmes, Jr., Augustus Hand, Earl Warren, William Brennan, Potter Stewart, and Griffin Bell. George Washington used recess commissions to fill judgeships created by the first Judiciary Act. Thomas Jefferson recess appointed ten federal judges and thirty Justices of the Peace – including twenty-five jurists whom John Adams had nominated and the Federalist Senate had earlier confirmed as "midnight" judges.[18] The Republic's first five Presidents recess appointed over thirty federal judges, including five Supreme Court justices.

The *Nixon* opinion prudently acknowledged: "Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counter-intuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the

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[18] The doubly-disappointed William Marbury received neither delivery of his ordinary commission from Adams, nor a recess commission from Jefferson. *See* David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 Cath. U. L. Rev. 349, 400 (1996).

Framers." *Nixon*, 506 U.S. at 235 (citations omitted). The majority cautioned that Judge Walter Nixon's "argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate." *Id.* Similarly, the judiciary should be conflicted-out of being the final arbiter of the uniform process by which judges are strategically and most efficiently benched.

The appointment of new judges serves as an "important constitutional check" on the *status quo* of a given court and the judiciary as a whole.[19] The Executive's use of the authority to bench judges has a uniquely transformative history.[20] "Presidents have long used the recess appointment power to ease the way for putting well-qualified and distinguished judges from underrepresented groups on the federal bench." Diana Gribbon Motz, *The Constitutionality and Advisability of Recess Appointment of Article III Judges*, 97 Va. L. Rev. 1665, 1680 (2011). William McKinley recess commissioned Jacob Triber to a trial bench in Arkansas as the nation's first Jewish federal

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[19] Vacancies on an appellate bench obviously increase the *en banc* voting power and panel influence of the incumbent judges. The power of incumbent judges is significantly increased when bench vacancies are prolonged and numerous, such as the D.C. Circuit has experienced for over a decade. Judges should not be final arbiters of the President's most efficient appointment method to "regulate" bench vacancies.

[20] *See* Victor Williams, *Estrada: Do a Recess Appointment*, Nat'l L.J. 12 (March 10, 2003).

judge. Woodrow Wilson recess appointed Samuel Alschuler as one of the first Jewish federal appellate jurists. Harry Truman utilized a recess commission to place the first African-American on the U.S. Court of Appeals, William Hastie. Four of the first five African-American federal appellate judges secured the bench by recess commission.

Seeking bench transformation during a period of reactionary Senate obstruction by regional factions of his own party, John F. Kennedy recess-appointed over twenty percent of his judges (with each winning subsequent confirmation). President Kennedy recess-commissioned seventeen judges on just one day – October 5, 1961. Thurgood Marshall was named to the Second Circuit on that day, providing the NAACP lawyer with much-needed protection for future harsh Senate confirmation ordeals. The first two women to rise to a federal district court were recess commissioned, including Sarah Hughes to a trial bench in Dallas, Texas. The only woman to administer the presidential oath of office, Judge Hughes, swore-in Lyndon Johnson at Dallas's Love Field inside Air Force One.[21]

President Johnson recessed appointed African-American judicial legends Spottswood Robinson, III and A. Leon Higginbotham. William Jefferson Clinton

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[21] *See* Mary L. Clark, *One Man's Token is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 Vill. L. Rev. 487, 514 (2004).

placed the first African-American on the Fourth Circuit after being blocked for years from making a permanent appointment. On the eve of the 21st Century, President Clinton recess commissioned Roger Gregory "in the grand tradition of Presidents of both parties, dating all the way back to George Washington, who have used their constitutional authority to bring much needed balance and excellence to our Nation's courts."[22]

III. Dense Political Thicket: Court's Review Beyond Textual Commitment to Executive Requires Judicial Review of Appointment Obstruction – Holds, Filibusters, and House-Senate Scheduling Schemes

The instant adjudication is a continuation of an intense political conflict over Barack Obama's appointments and governance. If this Court is to review the President's exercise of recess appointment authority, it should also review the constitutionality of Senate minority confirmation obstruction – including holds and filibusters – that directly caused the emergency need for temporary appointments.

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[22] 36 Weekly Comp. of Pres. Doc. 3180 (Dec. 27, 2000), http://www.gpo.gov/fdsys/pkg/WCPD-2001-01-01/html/WCPD-2001-01-01-Pg3180.htm.

A. Review of Obstruction that Led to Temporary Commissions

Amicus respectfully asserts "Senate inaction" fails to adequately describe how and why Craig Becker's NLRB nomination was withdrawn, and a replacement recess commissioned. (*See* Pet. Brief at 3 n.1). Forceful, repeated Senate obstructionist action led to the Becker withdrawal. As with many other Barack Obama nominees, Becker, in his multiple nominations, faced months and years of very active confirmation tribulation. Arcane procedural hurdles, extreme slow walking, committee hearing tribulations, hundreds of written interrogatories, floor speech defamations, extortion holds, and silent filibusters are the regular order of Senate confirmation business. At the end of nominee Becker's first confirmation travail, he received 52 favorable votes; a simple-majority constitutionally sufficient for Senate confirmation, but not the super-majority tabulation required for filibuster cloture.

Almost immediately after the President's January 2012 appointments, the political conflict was moved to federal court fora. Battles began in jurisdictions all across the nation, and congressional obstructionists mounted a frontal attack in the instant action. Forty-two members of the Senate minority and the House Speaker filed amici briefs below to formally support the Respondent's challenge. The 42 Senators also participated in oral argument below.

B. No Judicially Manageable Standards and No Respect Due

Once deep in the political thicket, however, the Court will find no manageable standards to define "recess," to resolve the congressional interference with the Executive's appointment obligation, to supervise the internal conflict among congressional factions, nor to measure how much deference is due the Senate when the President signs recess commissions, if any. This Court should not create or adopt a recess standard that would distinguish different types of Senate unavailability and that would attach constitutional weight to those various types of Senate breaks. *Nixon* explained that "the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Nixon*, 506 U.S. at 228.

Judicial inquiry will necessarily focus on the 2011 congressional scheduling scheme to force the Senate to hold pro forma sessions every three days. A House freshmen faction orchestrated the stratagem with the express motive to "prevent any and all recess appointments by preventing the Senate from recessing for the remainder of the 112th Congress."[23]

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[23] Victor Williams, *House GOP Can't Block Recess Appointments*, Nat'l L.J. 39 (Aug. 15, 2011) (quoting Representative Jeff

(Continued on following page)

It is unlikely that this Court could undertake "independent resolution" of the obstruction and the President's recess commission response "without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. Outside adjudication, disrespect for the partisan confirmation dysfunction is past due.[24]

C. Third Circuit's *New Vista* Creates Nonjusticiability Conflict with Eleventh Circuit's *Evans*

When rejecting a challenge to President George W. Bush's recess appointment of Judge William Pryor, the *en banc* Eleventh Circuit ruled that the "controversial" aspect of the "blocked" confirmation "presents a political question." *Evans v. Stephens*, 387 F.3d 1220, 1227 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005). The Eleventh Circuit refused to create a standard to measure "how much Presidential deference is due to the Senate when the President is

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Landry, Letter to the Speaker of the House John Boehner, et al., June 15, 2011).

[24] *See* Hon. John G. Roberts, *Year-End Report on the Federal Judiciary* 8 (2010) ("Each political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes."); *See* Oskar Garcia, *Kennedy: Judges' Senate Confirmation Too Political*, A.P. The Big Story, Aug. 15, 2012, http://bigstory.ap.org/article/kennedy-judges-senate-confirmation-too-political.

exercising the discretionary authority that the Constitution gives fully to him." *Id.*

Two prior challenges to recess appointed judges were rejected by lower courts fully *on the merits*. *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985), cert. denied, 475 U.S. 1048 (1986) and *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963). Neither case, however, involved appointments with any degree of underlying confirmation conflict as here. And, unlike in *Evans*, neither opinion addressed nonjusticiability.

Most recently, the Third Circuit created a direct conflict with the Eleventh Circuit's nonjusticiability determination in *Evans* when deciding another challenge to Barack Obama's NLRB recess appointments. *NLRB v. New Vista Nursing and Rehabilitation*, ___ F.3d ___, 2013 WL 2099742 (3d Cir. May 16, 2013). The court considered and rejected various political question arguments lodged by this amicus. *Id.* at 23-31. The panel majority ruled that judges – not the President – have final authority to dictate "when" the President may make a recess appointment. *Id.* at 28.

After rejecting Article II, Section 2's textual commitment of the issue to the President, the two-judge panel majority minimized the relevance of this Court's *Nixon* ruling, dismissed prudential concerns, and proclaimed discovery of "several manageable

standards" for resolution.[25] The majority conceded, however, that "there is no likely judicially manageable standard" to be found if the question is framed "as the amicus has" to include the underlying congressional obstruction that lead to the NLRB commissions. *Id.* at 29-30.

Declaring a question to be narrowly-framed does not make it so. Denying the breadth and context of the political question being asked does not alter the power usurpation of the answer. Nor does such judicial denial limit the answer's disruptive political effects. By revoking the March 2010 recess appointment of Craig Becker, the court fouls every intrasession recess commission ever signed by any President – 329 such appointments made since 1981. The court taints unknown-thousands of official acts and judgments made by those officers and judges as *ultra vires*.

IV. Finality in Appointments

The nation's extreme need for finality in appointment practice weighs heavily in favor of a broad political-question determination.

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[25] A detailed dissent, which forcefully rebutted the whole of the majority's merits opinion, also explained why the majority's chosen intersession-only recess standard was "unworkable and not judicially manageable."

A. Extreme Need for Finality

When *Nixon* was below, Judge Steven Williams wrote: "Although the primary reason for invoking the political question doctrine in our case is the textual commitment . . . , the need for finality also demands it." *Nixon v. United States*, 938 F.2d 239, 245-46 (D.C. Cir. 1991) (citations omitted). The cost is chaos: "[T]he intrusion of the courts would expose the political life of the country to months, or perhaps years, of chaos." *Id.* at 246. The many challenges to the 2012 NLRB and CFPB commissions have already resulted in both political and economic disruptions. The intended and unintended consequences of the ruling below promise exponential chaos. As Judge Williams reasoned: "If the political question doctrine has no force where the Constitution has explicitly committed a power to a coordinate branch and where the need for finality is extreme, then it is surely dead." *Id.*

B. *Goldwater v. Carter*'s Expedient Example

Barry Goldwater led a group of nine Senators and sixteen House members in suing President James Earl Carter for his controversial abrogation of a treaty with the Republic of China (Taiwan). A district judge escalated the conflict by ruling that the President needed approval of two-thirds of the Senate, or a congressional majority, to abrogate the Mutual Defense Treaty. Amid increasing political turmoil, the *en banc* D.C. Circuit reversed on the

merits. The congressional delegation immediately sought *certiorari* review and the Solicitor General's response raised political question nonjusticiability – albeit in the alternative. Without allowing merits briefing and without scheduling oral argument, the Court issued a one-sentence summary order: "Certiorari granted, judgment vacated, and case remanded with directions to dismiss the complaint." 444 U.S. 996 (1979). The high court process took all of ten days.

In a lead concurrence, then-Associate Justice William Rehnquist explained: "[T]he basic question presented by the Respondent in this case is 'political' and therefore nonjusticiable." *Id.* at 1002. "Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty." *Id.* at 1003. More so here, "while the Constitution is express as to the manner in which the Senate shall participate" in the confirmation of a permanent appointment, its next clause negates "that body's participation" in the President's signing of a temporary commission.[26] *Goldwater* sets the example for this Court's prudent

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[26] *See* Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 Calif. L. Rev. 235, 265-69 (2008) (referencing Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1273 (1995)).

and expedient withdrawal from this ongoing political conflict.

CONCLUSION

For the foregoing reasons, Amicus argues that the petition for writ of *certiorari* should be granted to include a threshold nonjusticiability determination.

Respectfully submitted,

VICTOR WILLIAMS,
Counsel of Record
Faculty Suite 480
COLUMBUS SCHOOL OF LAW
CATHOLIC UNIVERSITY OF AMERICA
Washington, D.C. 20064
(202) 319-5559
williamv@law.edu

PETITIONER'S BRIEF

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AND
BRIEFS

Supreme Court, U.S.
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In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BETH S. BRINKMANN
Deputy Assistant Attorney General
CURTIS E. GANNON
Assistant to the Solicitor General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Deputy General Counsel
JOHN H. FERGUSON
MARGERY E. LIEBER
Associate General Counsels
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board
Washington, D.C. 20670

Library of Congress
Law Library

QUESTIONS PRESENTED

The Recess Appointments Clause of the Constitution provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, Cl. 3. The questions presented are:

1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between sessions of the Senate.

2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

3. Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro-forma sessions.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the International Brotherhood of Teamsters Local 760 is also a party to the proceeding. It was an intervenor in the court of appeals.

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In the Supreme Court of the United States

No. 12-1281

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is reported at 705 F.3d 490. The decisions and orders of the National Labor Relations Board (Pet. App. 56a-63a) and the administrative law judge (Pet. App. 63a-90a) are reported at 358 NLRB No. 4.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2013. The petition for a writ of certiorari was filed on April 25, 2013, and granted on June 24, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Recess Appointments Clause (Art. II, § 2, Cl. 3) provides: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the

Senate, by granting Commissions which shall expire at the End of their next Session." Other pertinent constitutional and statutory provisions are reproduced in an appendix to this brief. App., *infra*, 90a-96a.

STATEMENT

1. The National Labor Relations Board administers the National Labor Relations Act, 29 U.S.C. 151 *et seq.* The Board consists of five members who serve five-year terms and are appointed by the President with the advice and consent of the Senate. 29 U.S.C. 153(a). Three members constitute a quorum, 29 U.S.C. 153(b), and when three positions on the Board become vacant, it cannot adjudicate cases involving alleged unfair labor practices, see *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2640-2645 (2010).

In August 2011, the Board's membership fell to three members, one of whom had been appointed by the President during a 2010 recess of the Senate. Because that member's long-pending nomination was withdrawn after Senate inaction, it was understood that his term would expire at the end of the First Session of the 112th Congress. Pet. 3; Pet. App. 15a. That session ended at noon on January 3, 2012, when the Second Session began by operation of Section 2 of the Twentieth Amendment. See Pet. 3-4 & n.2.

Approximately two weeks earlier, the Senate had adjourned pursuant to an order adopted by unanimous consent. Pet. App. 91a-92a. That order provided that the Senate would reconvene "for pro forma sessions only, with no business conducted," on four dates between December 17 and the First Session's end on January 3. *Id.* at 91a. Each "pro forma session" was to be followed immediately by another adjournment. *Ibid.* The Senate's order further provided that after the Second Ses-

sion of the 112th Congress commenced at noon on January 3, the Senate would again adjourn, reconvening only for pro-forma sessions, "with no business conducted," on five specified dates from January 6 to January 20. *Ibid.* Once again, the order provided that each pro-forma session would be followed immediately by another adjournment. *Ibid.* The order further provided that the Senate would resume business on January 23. *Id.* at 91a-92a. In another order entered the same day, the Senate referred to its impending absence as a "recess." 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011).

By virtue of the Senate's order, the Second Session of the 112th Congress began with a period of nearly three weeks, from January 3 to 23, 2012, in which the Senate had provided that "no business [would be] conducted," and during which no Senators were required to attend other than the one who gaveled in and out each pro-forma session. See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __, at 2, 13 (Jan. 6, 2012) (*OLC Pro Forma Op.*), www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

In view of the Senate's explicit cessation of business for the period from January 3 to January 23, 2012, the President invoked the Recess Appointments Clause and appointed three new Board members on January 4, one day after the Board lost its quorum. Pet. App. 15a.

2. This case involves a final order the Board issued shortly after those appointments. In September 2011, an administrative law judge had found that respondent Noel Canning (hereinafter, respondent) had committed an unfair labor practice. Pet. App. 63a-90a. On February 8, 2012, a three-member panel of the Board—which included two members appointed during the January

2012 recess—affirmed the administrative law judge's findings and conclusions and adopted his proposed order with minor modifications. *Id.* at 15a-16a, 56a-63a.

Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the Board filed a cross-petition for enforcement of the order. Pet. App. 2a; see 29 U.S.C. 160(e) and (f). Respondent contested the Board's order on the merits and also contended, for the first time, that the order was invalid because the Senate was purportedly not in recess when the President made his appointments to the Board. Pet. App. 2a-3a. Respondent claimed that the Senate's periodic "pro forma sessions" transformed what would otherwise have been a 20-day recess into a series of three-day adjournments, each too brief to constitute a recess for purposes of the Recess Appointments Clause. Resp. C.A. Br. 29-36.

3. The court of appeals granted respondent's petition for review and vacated the Board's order. Pet. App. 1a-55a. The court considered and rejected respondent's nonconstitutional challenges to the merits of the Board's order. *Id.* at 3a-10a. It also concluded it had jurisdiction to address respondent's constitutional challenge, which had not been raised before the Board. *Id.* at 11a-13a.[1]

Turning to the constitutional merits, the court held that the President's appointments to the Board were not authorized by the Recess Appointments Clause. Pet.

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[1] The Eighth Circuit recently held that a recess-appointments challenge must be exhausted with the Board. See *NLRB* v. *RELCO Locomotives, Inc.*, No. 12-2111, 2013 WL 4420775, at *28-*31 (Aug. 20, 2013). The Board has not taken that position in cases where it would have been powerless to do something to avoid the challenge (such as convene a three-member panel that included no challenged appointee).

App. 17a-52a. The court did not, however, rely on, or even discuss, respondent's principal contention that the Senate's pro-forma sessions prevented its 20-day break from being a "recess" for purposes of the Clause. Instead, the court based its decision on two broader grounds.

a. The court first held that the Recess Appointments Clause applies only to *inter*-session recesses of the Senate (*i.e.*, recesses that occur between the end of one enumerated session of Congress and the beginning of the next) and not to *intra*-session recesses (*i.e.*, recesses that take place during the course of such a session).[2] Pet. App. 18a-35a. The court inferred that limitation principally from the Clause's authorization for the President to fill vacancies during "the Recess" of the Senate. The court reasoned that the use of a definite article ("the," rather than "a") and a singular noun ("Recess," rather than "Recesses") indicated an intention to confine the power to a specific recess rather than to recesses as a class. *Id.* at 19a. The court surmised that the specific recess the Framers contemplated was the recess that occurs between enumerated sessions of the Senate. *Id.* at 20a-21a. The court recognized that Presidents had long interpreted the Clause to apply to both inter- and intra-session recesses, and had made numerous appointments based on that understanding. But the court deemed it more significant that there had been no documented intra-session recess appointments before 1867,

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[2] The court of appeals referred to the "two or sometimes three sessions per Congress." Pet. App. 20a. Since 1934, such sessions have all been separately numbered, though many earlier Senate "sessions" received the label "special," without any number. S. Pub. 112-12, *Official Congressional Directory, 112th Congress* 522-538 (2011).

and that the court itself had identified only a few such appointments before World War II. *Id.* at 23a.

b. Although that holding was "sufficient to compel a decision vacating the Board's order," Pet. App. 35a, a majority of the court of appeals also held that, even during an inter-session recess, the President may not fill a vacancy unless it first arose during that same recess. *Id.* at 35a-52a. The court rejected the Executive's long-standing position, on which numerous appointments had rested, that in the context of the Recess Appointments Clause, the term "happen" is properly understood to mean "happen to exist," rather than "happen to arise." *Id.* at 35a-37a. The court read the early history of recess appointments as supporting its view that only vacancies arising during a recess may be filled by appointments during that recess. *Id.* at 38a-41a.

c. Because none of the vacancies on the Board had arisen during an inter-session recess and been filled during that recess, the court held that the Board lacked a valid quorum when it issued its order in this case and vacated that order. Pet. App. 34a-35a, 46a-47a, 52a, 53a.

d. Judge Griffith concurred in part and concurred in the judgment, agreeing that the Recess Appointments Clause is confined to inter-session recesses, but declining to decide whether it is limited to vacancies that first arise during the same recess. Pet. App. 54a-55a.

4. The Board sought certiorari, presenting the two questions that had been decided by the court of appeals. In its order granting certiorari, the Court directed the parties also to address "[w]hether the President's recess-appointment power may be exercised when the Senate is

convening every three days in *pro forma* sessions." 133 S. Ct. 2861-2862.[3]

SUMMARY OF ARGUMENT

A. The court of appeals erred in holding that the Recess Appointments Clause does not authorize presidential appointments during intra-session recesses. The plain meaning of the term "recess"—a period of cessation from usual work—applies to both inter- and intra-session recesses. The court of appeals thought the Clause refers to "the" (rather than "a") recess in order to refer to one recess, which it further surmised must be an inter-session recess. But the definite article "the" is commonly used—including in the Constitution itself—to refer to a category of events, and the phrase "the recess" was, by 1787, regularly used to describe the equivalent of intra-session breaks of the British Parliament, of state legislatures, of the Continental Congress, and of the Constitutional Convention itself.

Excluding intra-session recesses from the scope of the Recess Appointments Clause would undermine its central purposes, because it would prevent the President from being able to fill offices, and exercise his constitutional responsibility to take care that the laws be faithfully executed, even when the Senate is unable, for a significant period of time, to give its advice and consent to appointments.

The court of appeals believed there were only a handful of intra-session recess appointments before 1943, indicating that the Executive had theretofore assumed it

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[3] On July 30, 2013, the Senate confirmed four new Board members, and confirmed Member Pearce for an additional term. 159 Cong. Rec. S6049-S6051 (daily ed.). Those appointments do not affect the decision below, which pertained to the Board's prior configuration.

lacked power to make them. In fact, Presidents made intra-session recess appointments in every year before 1943 in which there was an intra-session recess of significant duration. At least fourteen Presidents have, collectively, made at least 600 civilian appointments (and thousands of military ones) during intra-session recesses, and that practice was expressly endorsed in a 1921 Attorney General opinion and described as "the accepted view" of the Clause by a 1948 Comptroller General opinion. The court of appeals' reasoning would dramatically upset that long-settled equilibrium between the political Branches.

B. The court of appeals further erred in holding that the Clause allows the President to fill only those vacancies that first arise during the recess in question. The ambiguous nature of the Clause's reference to "Vacancies that may happen during the Recess of the Senate" was recognized by President Jefferson in 1802 and by Attorney General Wirt in 1823, and the Clause's purposes are best served by allowing the President to fill vacancies that *exist* during the recess, because that ensures a genuine opportunity at all times for vacancies to be filled, even if only temporarily. Otherwise, important offices would remain vacant solely because prior occupants died or resigned—or those offices were first established—shortly before, rather than shortly after, a recess began.

Since 1823, a long series of Attorney General opinions (and every court-of-appeals decision before the one below) had repeatedly sustained the President's authority to use recess appointments to fill vacancies that preexisted the recesses during which those appointments were made. Indeed, the court of appeals' contrary reading is such a dramatic break with long-settled practice that records have not even been kept in a fashion that

consistently shows whether it was satisfied. Even so, nearly all Presidents have demonstrably made at least some, and often many, appointments that the court of appeals would deem unconstitutional. And, although the court of appeals believed that its view was consistent with the "earliest understanding of the Clause" (Pet. App. 38a), there was in fact no such settled understanding before 1823. There was instead continued debate, and there were indications from each of the first four Presidents—including actual appointments by Washington, Jefferson, and Madison—that recess appointments can indeed be used to fill vacancies that pre-existed the recess.

C. As an alternative ground for affirmance, respondent contends that the Senate was not in recess on January 4, 2012, for purposes of the Recess Appointments Clause, because the "pro forma" sessions it was holding every three days transformed what would have been a 20-day recess into a series of breaks too short to constitute a recess under the Clause. The Court should reject that contention. The Senate expressly ordered that it would conduct "no business" during the entire 20-day period between January 3 and 23, 2012, and it proceeded to do exactly that. It cannot, through the stratagem of seriatim pro-forma sessions, extinguish the President's express constitutional authority to make recess appointments while simultaneously being unavailable itself to provide advice and consent.

Since 1905 and 1921, respectively, the Senate and the Executive have formally recognized that a "recess" for purposes of the Clause exists during a period of time when the Senate's members owe no duty of attendance and when, because of its absence, the Senate cannot receive communications from the President or partici-

pate as a body in making appointments. That was true throughout the 20-day period here, notwithstanding the periodic pro-forma sessions that were being held merely as a matter of form.

Respondent notes that, at any pro-forma session, the Senate might have overturned its unanimous-consent order directing that "no business" be conducted. But the mere possibility that the Senate might be recalled early cannot prevent a substantial break from being a recess for recess-appointments purposes, because that would make the Clause inapplicable even during traditional recesses pursuant to conditional adjournment resolutions, which typically reserve to congressional leadership the power to recall either or both Houses if the public interest warrants.

Respondent attempts to manufacture at least some pedigree for the pro-forma-session stratagem, claiming that Presidents Reagan and George W. Bush acknowledged its legitimacy as a means of preventing recess appointments in 1985 and 2007. But there were no such acknowledgments, which makes it impossible for respondent to rely on any settled practice or Executive acquiescence.

Respondent separately contends that, for several decades, the House of Representatives and the Senate have used pro-forma sessions to comply with the Adjournment Clause, which prevents either House from adjourning for more than three days without the consent of the other. The better view, however, is that pro-forma sessions do not satisfy the Adjournment Clause. But even if they could—assuming arguendo that Congress would likely receive sufficient deference in construing a provision insofar as it principally involves internal legislative affairs—no such deference would be applicable in

this circumstance. The deployment of pro-forma sessions in an effort to avoid application of the Recess Appointments Clause would disrupt the balance that Article II strikes between the President and the Senate. When the Senate is absent in fact but present only by virtue of a legal fiction, the President may use the auxiliary method of appointment that the Constitution expressly provides for circumstances when the Senate is unavailable to provide its advice and consent and there are vacancies that the public interest requires to be filled, even if only on a temporary basis.

ARGUMENT

The court of appeals recognized (Pet. App. 30a, 41a) that both of its constitutional holdings were contrary to the only other court-of-appeals decisions that had addressed those questions. See *Evans* v. *Stephens*, 387 F.3d 1220, 1224-1227 (11th Cir. 2004) (en banc), cert. denied, 544 U.S. 942 (2005); *United States* v. *Woodley*, 751 F.2d 1008, 1012-1013 (9th Cir. 1985) (en banc); *United States* v. *Allocco*, 305 F.2d 704, 709-715 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963).[4] Both holdings would eviscerate long-established practice under the Constitution and upend the separation-of-powers equilibrium that practice reflects. Thousands of intra-session recess appointments have been made, collectively, in the 1860s and by almost every President since 1921. And the court of appeals' construction of "happen" has been repeatedly rejected in a series of Attorney General opinions begin-

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[4] After the decision below, two other circuits held that the President cannot make recess appointments during intra-session recesses. See *NLRB* v. *Enterprise Leasing Co. Se.*, 722 F.3d 609 (4th Cir. 2013); *NLRB* v. *New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013), petition for reh'g pending (filed July 1, 2013; stayed July 15, 2013).

ning in the Monroe administration. It is also inconsistent with appointments by, or the expressed views of, all four of Monroe's predecessors, and inconsistent with appointments by at least 35 of his 38 successors. Those deeply engrained practices stand in vivid contrast to the lack of any historical pedigree for respondent's view that the Senate may use the pro-forma-session stratagem to block the President from exercising his Article II authority to make appointments during a 20-day period when its members will not assemble and are scheduled to "conduct[]" "no business" (Pet. App. 91a), and are therefore unable to perform their constitutional role of providing advice and consent. This Court should sustain the validity of the President's January 2012 appointments to the Board.

A. The President's Recess-Appointment Authority Is Not Confined To Inter-session Recesses Of The Senate

A legislative body like the Senate characteristically begins a recess, whether long or short, in one of two ways. By adjourning *sine die* (*i.e.*, without specifying a day for its return), it ends its current session, and the ensuing recess, which lasts until the beginning of the next session, is commonly known as an *inter*-session one. See Pet. App. 47a-49a. By adjourning, instead, to a specified time or date, the body typically resumes the business of its current session when it reconvenes, and the intervening recess is commonly known as an *intra*-session one.[5]

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[5] If there is no adjournment *sine die*, a session will end automatically at the time appointed by law for the start of a new session. See Thomas Jefferson, *A Manual of Parliamentary Practice* § LI, at 166 (2d ed. 1812) (*Jefferson's Manual*).

The text and purposes of the Recess Appointments Clause, as well as long-established practice, cut decisively against excluding intra-session recesses from the scope of the Clause.

1. The constitutional text authorizes appointments during intra-session recesses

The Recess Appointments Clause authorizes the President to make temporary appointments "during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, Cl. 3. That unqualified reference to "the Recess of the Senate" attaches no significance to whether a recess occurs during a session or between sessions.

a. As understood both at the time of the Framing and today, a "recess" is a "period of cessation from usual work." 13 *Oxford English Dictionary* 322-323 (2d ed. 1989) (*OED*) (citing seventeenth- and eighteenth-century sources); see 2 Noah Webster, *An American Dictionary of the English Language* 51 (1828) ("[r]emission or suspension of business or procedure"); 2 Samuel Johnson, *A Dictionary of the English Language* s.v. "recess" (1755) ("remission or suspension of any procedure"); Thomas Sheridan, *A General Dictionary of the English Language* s.v. "recess" (1780) (similar). That definition is equally applicable to recesses between legislative sessions and recesses within those sessions.

The Third Circuit has suggested that other, less-apposite definitions of "recess" "contain some connotation of permanence or, at least, longevity." *New Vista*, 719 F.3d at 221-222 (citing " '[r]etirement; retreat; withdrawing; secession,' as well as '[d]eparture' and '[r]emoval to distance' ") (citation omitted). But that connotation cannot possibly support a categorical distinction between inter- and intra-session recesses for purposes of

the Clause. The Senate has had many inter-session recesses that were zero, one, or two days long (*e.g.*, in March 1791, 1793, 1797, 1801, 1867, 1877, 1881, 1885, 1897, 1903, 1905, 1909, 1913, 1917, 1921, and 1925; in December 1903 and 1922; in January 1941, 1942, 1980, 1992, and 1996). S. Pub. 112-12, *Official Congressional Directory, 112th Congress* 522-535 (2011) (*Congressional Directory*), www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf.[6] Intra-session recesses are often much longer than that. The Senate's first intra-session recess of more than three days took place between December 23 and 30, 1800; many intra-session recesses since 1867 have been several weeks or even months long. *Id.* at 525-538.

b. In the legislative context, the Founding generation understood that the term "recess" applies to breaks both during and between sessions. The term described both kinds of breaks in British Parliamentary practice. See, *e.g.*, 13 *OED* 323 (quoting House of Commons request about an impending "Recess of this Parliament" that was during a session) (citing 3 H.L. Jour. 61 (1620)); 33 H.L. Jour. 464 (Nov. 26, 1772) (King's reference to a "Recess from Business" that was between sessions); *Jefferson's Manual* § LI, at 165 (describing procedural consequences of "recess by adjournment," which did not end a parliamentary session); 1 Richard Chandler, *The History and Proceedings of the House of Commons from the Restoration to the Present Time* 50 (1742) (noting "the Recess" for three weeks in December 1661-January 1662 that occurred within Parliament's Second Session).

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[6] Parliament's inter-session recesses were "sometimes only for a day or two." 1 William Blackstone, *Commentaries on the Laws of England* 180 (1765).

American legislative practice in the Founding era conformed to that understanding. The Articles of Confederation authorized Congress to convene a "Committee of the States" during "the recess of Congress." Articles of Confederation of 1781, Art. IX, Para. 5, and Art. X, Para. 1. The only time Congress invoked that power was for a scheduled intra-session recess. See Pet. 14 & n.3.[7] Similarly, when the Constitutional Convention of 1787 adjourned on July 26 until August 6, delegates, including George Washington, referred to that intra-session break as "the recess," although the Convention did not adjourn *sine die* until September 17.[8]

State legislatures in the 1770s and 1780s also used "the recess" to refer to breaks brought about by adjournments to a date certain. In 1775, New York's Provincial Congress appointed a "Committee of Safety" to act "during the recess," which was a 14-day intra-session recess.[9] In 1781, New Jersey's legislature directed an official to purchase ammunition "during the recess of the

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[7] The Third Circuit dismissed this example because Congress ultimately failed to reconvene, as scheduled, before the session otherwise terminated by operation of law. See *New Vista*, 709 F.3d at 226 n.18. But that eventuality was unknown when the Committee was appointed, and Congress presumably expected an intra-session recess, because legislative committees were traditionally understood to be *prohibited* from meeting between sessions. See *Jefferson's Manual* § LI, at 165.

[8] 3 *The Records of the Federal Convention of 1787*, at 76 (Max Farrand ed., rev. ed. 1966) (*Farrand*) (letter from Washington to John Jay); 3 *Farrand* 191 (speech of Luther Martin); 2 *Farrand* 128 (July 26 adjournment), 649 ("Adjournment sine die").

[9] 2 *A Documentary History of the English Colonies in North America* 1346-1348 (Peter Force ed., 1839).

legislature," which was an intra-session break.[10] In 1783, a committee appointed to act "in the recess of the" Massachusetts legislature performed its duties during the equivalent of an intra-session break.[11] In 1786, the Journal of the New Hampshire House of Representatives reported the reading of public letters "received in the recess of" the legislature, referring to a period that followed an adjournment to a date certain.[12] Revolutionary-era constitutions in Pennsylvania and Vermont authorized the Executive to issue trade embargoes "in the recess" of the legislature, and those powers were exercised during intra-session breaks in 1778 and 1781.[13]

c. Those examples refute the court of appeals' assumption that the Constitution's contemporaneous use of a definite article in the phrase "the Recess" necessarily connotes a recess at the end of a legislative session. Pet. App. 19a, 27a, 32a. So do other provisions of the Constitution itself, which repeatedly use a singular noun in conjunction with "the" when referring to types of events that will happen on multiple occasions. See 17 *OED* 879 (noting "the" can "refer[] to a term used generically or universally"). For example, the Constitution directs the Senate to choose a temporary President of the Senate "in *the Absence* of the Vice President," Art. I, § 3, Cl. 5

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[10] New Jersey Legis. Council Journal, 5th Sess., 1st Sitting 70 (1781); *id.*, 2d Sitting 9.

[11] Massachusetts S. Journal, entries for July 11 and October 18, 1783 (on file with Massachusetts State Archives) (documenting Committee's appointment; legislature's adjournment from July 11 to September 24, 1783; and delivery of Committee's report).

[12] 20 *Early State Papers of New Hampshire* 452, 488 (Albert Stillman Batchellor ed., 1891).

[13] See Pet. 14 & n.4 (discussing applications of Pa. Const. of 1776, § 20, and Vt. Const. of 1777, Ch. II, § XVIII).

(emphasis added)—a directive that necessarily applies to all Vice Presidential absences rather than any one absence or special kind of absence. Similarly, the Adjournment Clause provides that neither the House nor the Senate may adjourn for more than three days "during *the Session* of Congress" without the consent of the other body. Art. I, § 5, Cl. 4 (emphasis added). Because there are always two or more enumerated sessions in any Congress (see Art. I, § 4, Cl. 2; Amend. XX, § 2), the reference to "the Session" cannot refer to only a single one. And indeed the Appointments Clause refers to "the Advice and Consent of the Senate," obviously referring to something that would occur multiple times. Art. II, § 2, Cl. 2.

Precisely because there were multiple sessions per Congress, the Framers knew there would usually be multiple inter-session recesses during a single Congress. See, *e.g.*, *Congressional Directory* 522 (noting three or more sessions in each of the first five Congresses). That further vitiates the court of appeals' attempt to distinguish between "the Recess" and "recesses." Pet. App. 19a, 22a, 27a, 32a.

d. The court of appeals also noted that the Constitution sometimes uses the verb "adjourn" or the noun "adjournment" rather than "recess," and inferred that "recess" must have a more restrictive meaning than "adjournment." Pet. App. 19a-20a. As an historical matter, however, "adjournment" typically referred to the *act* of adjourning, while "recess" referred to the resulting *period* of cessation from work—a distinction reflected in the Constitution itself.[14] When the Continental Congress

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[14] Compare, *e.g.*, 1 *OED* 157 (using "adjournment" to refer to the "act of adjourning"), and U.S. Const. Art. I, § 7, Cl. 2 (Pocket Veto Clause) ("unless the Congress by their Adjournment prevent its

convened a committee "during the recess" in 1784, it did so following an intra-session "adjournment." 27 *J. Continental Cong. 1774-1789*, at 555-556 (Gaillard Hunt ed., 1928).

Even if the Constitution were thought to use "adjournment," like "recess," to refer to the period of a break in legislative work, as distinct from the act of adjourning, the Executive's position is entirely consistent with a distinction between a recess covered by the Recess Appointments Clause and an adjournment. The Adjournment Clause makes clear that the taking of a legislative break of three days or less "during the Session of Congress" is still an "adjourn[ment]," Art. I, § 5, Cl. 4, but the Executive has long understood that such short intra-session breaks—which do not genuinely render the Senate unavailable to provide advice and consent—are effectively *de minimis* and do not trigger the President's recess-appointment authority. See, *e.g.*, 33 Op. Att'y Gen. 20, 24-25 (1921); 16 Op. O.L.C. 15, 15-16 (1992); see also *Wright* v. *United States*, 302 U.S. 583, 593-596 (1938) (making similar point in construing Pocket Veto Clause).

Return, in which Case it shall not be a Law"), with 13 *OED* 322 (using "recess" to refer to the "period of cessation from usual work"), and U.S. Const. Art. II, § 2, Cl. 3 ("[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate"); see Neal Goldfarb, *The Recess Appointments Clause (Part 1)*, LAWnLinguistics.com, Feb. 19, 2013 (explaining that "recess" was generally not used as a verb because that function was performed by "adjourn"), http://lawnlinguistics.com/2013/02/19/the-recess-appointments-clause-part-1.

2. *Intra-session recess appointments are necessary to serve the purposes of the Recess Appointments Clause*

Excluding intra-session recesses from the scope of the Recess Appointments Clause would undermine its central purposes.

a. The Recess Appointments Clause ensures that vacant offices may be filled, albeit only temporarily, when the Senate is unavailable to offer its advice and consent; and it simultaneously frees the Senate from the obligation of being "continually in session for the appointment of officers." *The Federalist No. 67*, at 455 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The Clause enables the President to meet his continuous responsibility to "take Care that the Laws be faithfully executed," Art. II, § 3, which necessarily requires the "assistance of subordinates." *Myers* v. *United States*, 272 U.S. 52, 117 (1926); see 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 135 (Jonathan Elliot ed., 2d ed. 1836) (Archibald Maclaine) (explaining that the power "to make temporary appointments * * * can be vested nowhere but in the executive, because he is perpetually acting for the public").

Those purposes apply without regard to whether a recess occurs during a session or between sessions. The Senate is no more available to provide its advice and consent during an intra-session recess than it is during an inter-session recess. The President is no less in need of officers to execute the laws. And, for the Nation, it will often be equally "necessary for the public service to fill [certain vacancies] without delay." *Federalist No. 67*, at 455. Indeed, the need to fill vacancies may be greater during intra-session recesses, which have often, especially in modern Senate practice, accounted for more of the

Senate's absences than have inter-session recesses. See *Congressional Directory* 529-538.

Excluding intra-session recesses from the President's recess-appointment authority would create periods during which there is no power to fill vacant offices, even temporarily, no matter how long the recess or how great the need. The Recess Appointments Clause was adopted for the very purpose of preventing such disabling lacunae.

b. The court of appeals expressed concern that Presidents could use intra-session recess appointments to evade the Senate's advice-and-consent role. Pet. App. 26a. But history belies that concern. As explained below, the authority to make intra-session recess appointments has been accepted by both political Branches for nearly a century. Yet Presidents routinely seek Senate confirmation when filling vacant offices—and of course have strong practical incentives to do so, because recess appointments are only temporary and because seeking Senate consent alleviates inter-Branch friction.

The court of appeals' position, by contrast, would permit the Senate unilaterally to strip the President of his constitutional authority to make recess appointments despite its unavailability to give advice and consent, simply by replacing an adjournment *sine die* with a similarly long adjournment to a date certain near the constitutionally mandated end of the session. See Pet. 23; Amend. XX, § 2. The Framers could not have contemplated that the President could thus be disabled from filling important positions when the Senate is concededly unavailable.

3. *Long-standing practice supports intra-session recess appointments*

a. There are no comprehensive records of all recess appointments made throughout the Nation's history, and information regarding recess appointments to military positions is particularly difficult to ascertain. See Henry B. Hogue, Cong. Research Serv., *Memorandum re: Intrasession Recess Appointments* 1-2 (Apr. 23, 2004). It is nevertheless apparent that, since the 1860s, at least 14 Presidents have made more than 600 civilian appointments and thousands of military appointments during intra-session recesses of the Senate. See App., *infra*, 1a-64a (identifying known intra-session recess appointments).

The court of appeals dismissed the significance of that historical practice on the grounds that no President made such an appointment "for at least 80 years after the ratification" and that "such appointments were exceedingly rare" "for decades thereafter." Pet. App. 23a-24. In its view, "the infrequency of intrasession recess appointments during the first 150 years of the Republic 'suggests an assumed *absence* of [the] power' to make such appointments." *Id.* at 24a (quoting *Printz* v. *United States*, 521 U.S. 898, 908 (1997)) (alterations in original). But that inference is incorrect because it does not account for the fact that the rise of intra-session recess appointments closely tracked the rise of intra-session recesses, and therefore suggests no assumed absence of power.

Before the Civil War, only five intra-session recesses (in 1800, 1817, 1828, 1857, and 1859) exceeded three days; each was less than two weeks long and confined to the period around Christmas and New Year's Day. See *Congressional Directory* 522-525. Beginning in Decem-

ber 1862, short holiday recesses of less than 20 days became fairly common, but until 1943 there were only four years with longer intra-session recesses (at a different time of year): 1867, 1868, 1921, and 1929. *Id.* at 525-527. In every one of those four years, the President made intra-session recess appointments. President Andrew Johnson made at least 32 such appointments in 1867, and at least 25 in 1868. See App., *infra*, 1a-9a. President Harding made at least four such appointments in 1921. *Id.* at 9a. President Hoover appointed eight members of the new Federal Farm Board and two generals in 1929. *Id.* at 10a-11a.

Nor were the Senate's holiday recesses understood to be excluded from the President's power. President Lincoln appears to have made recess appointments of several Brigadier Generals during holiday recesses in 1862 and 1863.[15] During the 1927-1928 holiday recess, Presi-

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[15] See, *e.g.*, Appointment Letter of Thomas G. Stevenson, Dec. 24, 1862, Vol. 6, p. 224, *Letters of Army Appointments 1829-1945* (Entry 314), Records of the Adjutant General's Office, 1762-1984, Record Group 94 (RG 94), National Archives Building (NAB), Washington, D.C. (informing Stevenson of presidential appointment, during Senate's recess, as Brigadier General and noting that "[s]hould the Senate, at their next session, advise and consent thereto, you will be commissioned accordingly"); Appointment Letter of James H. Ledlie, Dec. 24, 1862, Vol. 6, p. 225, Entry 314, RG 94, NAB (same); Letter from William A. Pile to C.W. Foster, Jan. 7, 1864, *Letters Received by the Commission Branch of the Adjutant General's Office, 1863-1870* (National Archives Microform Publication M1064, roll 48, file P399), RG 94, NAB (acknowledging receipt and acceptance of the "communication of December 29th 1863 enclosing my appointment"); see also John H. Eicher & David J. Eicher, *Civil War High Commands* 342, 430, 511, 724, 726, 729 (2001); but cf. Appointment Letter of Daniel Ullmann, Jan. 13, 1863, Vol. 6, p. 230, Entry 314, RG 94, NAB (issuing similarly phrased appointment to Ullmann as Brigadier General while the Senate was in session).

dent Coolidge appointed a member of the Interstate Commerce Commission. App., *infra*, 10a. And in December 1897, it was reported that President McKinley would make "[n]o appointments * * * during the holiday recess of Congress except in case of emergency." *Only Necessary Appointments*, N.Y. Times, Dec. 21, 1897, at 3.

As that sentiment demonstrates, the six dozen known intra-session appointments before 1943 cannot be explained by any assumed absence of power. Instead, they reflect repeated appointments by the President during the few longer intra-session recesses.

To be sure, for a relatively brief period beginning in 1901, the Executive Branch took a different view. An opinion by Attorney General Knox concluded that "the Recess" did not include intra-session recesses, in large part because he could otherwise "see no reason why such an appointment should not be made during any adjournment, as from Thursday or Friday until the following Monday." 23 Op. Att'y Gen. 599, 600, 603 (1901). In doing so, however, Knox had to reject the only judicial precedent on point, since the Court of Claims had held in 1884 that it had "no doubt" about the validity of one of

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Stevenson, Ledlie, and others were not confirmed—apparently because the Senate believed there were not enough vacancies to begin with, not because Lincoln had acted during an intra-session recess. See S. Exec. Journal, 37th Cong., 3d Sess. 128-129 (1863) (rejecting nominations of multiple appointees on the ground that there had been "no law authorizing said appointments"); Exec. Doc. No. 29, 37th Cong., 3d Sess. 1-2 (January 29, 1863 letter from Secretary of War, responding to Senate resolution, including both inter- and intra-session recess appointees in list of brigadier generals whose positions the War Department believed were "necessarily implied" by a law authorizing the increase of the volunteer and militia force).

Andrew Johnson's 1867 intra-session appointments. *Gould* v. *United States*, 19 Ct. Cl. 593, 595-596. Knox also overlooked the fact that three 1868 Attorney General opinions (12 Op. Att'y Gen. 449; 12 Op. Att'y Gen. 455; 12 Op. Att'y Gen. 469) did not "mention any distinction between intrasession and intersession recesses," even though those opinions pertained to appointments made during an intra-session recess. Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 410 (2005). In any event, Knox's approach was short-lived.

In 1905, after a set of controversial appointments made during a putative *inter*-session recess, the Senate charged its Judiciary Committee with determining "[w]hat constitutes a 'recess of the Senate'" for recess-appointment purposes. S. Rep. No. 4389, 58th Cong., 3d Sess. 1 (*1905 Senate Report*). The committee concluded that the word "recess" is used "in its common and popular sense" and means

> the period of time when the Senate is *not sitting in regular or extraordinary session* * * * ; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.

Id. at 1, 2. Per Senate precedent, that report remains an authoritative construction of the term "recess." See S. Doc. No. 28, 101st Cong., 2d Sess., *Riddick's Senate Procedure: Precedents and Practices* 947 & n.46 (1992). In 1921, Attorney General Daugherty relied on that report and recognized the same considerations for determining whether a "recess" exists for purposes of the Clause. 33 Op. Att'y Gen. at 24-25. Daugherty rejected Knox's reasoning and concluded that intra-session re-

cesses of sufficient length do trigger the Recess Appointments Clause. *Id.* at 21, 25.

b. The frequency of intra-session recesses—and appointments—increased dramatically during World War II and the beginning of the Cold War. In 1943, 1944, 1945, 1947, and 1948, there were months-long intra-session recesses (often during the summer), see *Congressional Directory* 528, and multiple recess appointments were made in each of those years. App., *infra*, 11a-18a.

For instance, on August 31, 1943—two weeks before the end of a 2½-month intra-session recess and two weeks after the "conquest of Sicily"—President Roosevelt invoked the Recess Appointments Clause to commission Dwight Eisenhower as a permanent Major General in the United States Army.[16] And, on August 16, 1945, two days after the surrender of Japan, President Truman invoked the Clause during an intra-session recess to appoint Dean Acheson as Under Secretary of State.[17]

When the Senate was in intra-session recess between July 27 and November 17, 1947 (*Congressional Directory* 528), President Truman made recess appointments of thousands of officers in the Army and Air Force, in order to comply with December 31, 1947, statutory deadlines.[18]

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[16] *The Public Papers and Addresses of Franklin D. Roosevelt, 1943*, at 370-371 (Samuel I. Roseman ed., 1950); *Congressional Directory* 528.

[17] Robert L. Beisner, *Dean Acheson: A Life in the Cold War* 24 (2006).

[18] See Officer Personnel Act of 1947, ch. 512, § 509(m), 61 Stat. 897 (setting deadline for certain officer promotions); *id.* §§ 502(g), 505(f), 506(g), 507(d), 61 Stat. 884, 890, 892, 894-895 (superseding, effective Dec. 31, 1947, prior procedures for integrating active-duty officers

In 1947, Truman also made intra-session recess appointments of the Director of Central Intelligence, the Secretary of the Air Force, the General Counsel of the National Labor Relations Board, and more than 50 other officers. App., *infra*, 12a-18a.

In 1948, the Senate was in intra-session recess for all but 12 days between June 20 and December 31. *Congressional Directory* 528. During that 12-day window, President Truman nominated Maurice Tobin to replace the Secretary of Labor who had recently died. 94 Cong. Rec. 10,187 (Aug. 7, 1948). The Senate Minority Leader (Alben Barkley) sought to have the Senate consider the nomination without referring it to committee, but Senator Robert Taft successfully opposed that effort. *Ibid.* Taft said there was no reason to depart from the usual practice of referring the nomination to committee, because the President could "make a recess appointment on Monday." *Ibid.* And, Truman in fact made an intra-session recess appointment of Tobin, as well as of 897 Regular Army Medical Department officers and at least five dozen others that year. App., *infra*, 18a-24a. The same year, the Comptroller General (a legislative officer) described the President's ability to make intra-session appointments as "the accepted view" of the Recess Appointments Clause. 28 Comp. Gen. 30, 34 (1948).

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into the Regular Army); *New Permanent Career Officers Selected for Army and Air Force*, Army & Navy Journal, Oct. 11, 1947, at 146 (listing 5885 recess appointments granting "commissions in the Regular Army and Regular Air Force" to "officers and former officers of the National Guard, Officers Reserve Corps and Army of the United States"); *Officer Procurement Program*, Army & Navy Journal, Nov. 22, 1947, at 300 (reporting 216 more "recess appointments" as part of "[t]he final integration of" the Regular Army and Regular Air Force).

Since then, nearly all of President Truman's successors have made, collectively, hundreds of additional intra-session recess appointments. App., *infra*, 27a-64a. The only apparent exceptions are President Kennedy, whose term included no intra-session recesses (*Congressional Directory* 529), and Presidents Johnson and Ford. Throughout that period, opinions of the Attorney General, the Office of Legal Counsel, and the en banc Eleventh Circuit reaffirmed the validity of intra-session appointments. See *Evans*, 387 F.3d at 1224-1226; *OLC Pro Forma Op.* 5 (citing 1960 Attorney General opinion and OLC opinions from 2004, 1992, 1989, and 1979); 20 Op. O.L.C. 124, 161 (1996); 6 Op. O.L.C. 585, 585 (1982).

c. Such "[t]raditional ways of conducting government . . . give meaning to the Constitution." *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) (internal quotation marks and citation omitted). Especially in the separation-of-powers context, "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929); *id.* at 690 ("[A] practice of at least twenty years duration on the part of the executive department, acquiesced in by the legislative department, * * * is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.") (internal quotations marks and citation omitted). As Justice Frankfurter explained, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution," effectively makes "such exercise of power part of the structure of our government."

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J., concurring).[19]

The court of appeals' reasoning would dramatically upset the long-settled equilibrium between the political Branches, implicating profound reliance interests both within the government and far beyond it. See *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472-473 ("[O]fficers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department."). The Court should restore that equilibrium and confirm that future Presidents may, like so many of their predecessors, make recess appointments during intra-session recesses of the Senate.

B. The President May Fill Any Vacancy That Exists During The Recess Of The Senate

The court of appeals majority also erred in holding that the Recess Appointments Clause allows the President to fill only those vacancies that first arise during the recess in question. Pet. App. 35a-52a. Under that interpretation, a vacancy that comes into being the day after the Senate adjourns for a recess may be filled immediately, but a vacancy that arises the day before the recess cannot be filled *at all* until the Senate returns—regardless of how long the recess or how urgent the need. That interpretation is not required by the constitutional text and is inconsistent with the Clause's purposes. Since 1823, it has been formally and repeatedly rejected by the Executive. Nor does it bear the historical imprimatur that the court of appeals believed.

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[19] *INS* v. *Chadha*, 462 U.S. 919, 944 (1983), is not to the contrary. Unlike here, there had been a long and repeated history of *objection* to the practice at issue. See *id.* at 942 n.13 (noting eleven Presidents had objected to the legislative veto).

1. The reference to "Vacancies that may happen during the Recess" can be reasonably read as including vacancies that exist during the recess

The Recess Appointments Clause provides the President with the "Power to fill up all Vacancies that may happen during the Recess of the Senate." Art. II, § 2, Cl. 3. Respondent contends (Cert. Resp. 22) that the language "could not be clearer" in specifying that the President cannot fill a vacancy "that arose during the Senate's session and continued into the recess." But the language is far from unambiguous.

a. President Jefferson recognized in 1802 that the Clause "is *certainly susceptible* of [two] constructions," because it "may mean 'vacancies that may happen to *be*' or 'may happen to *fall*'" during the recess.[20] That conclusion follows from the plain meanings of the terms "happen" and "vacancy."

Respondent contends (Cert. Resp. 23) that "'happen' was (as it still is) a verb that expresses the sudden occurrence of an event." In respondent's view, an event occurs, or "'come[s] to pass,' only when it first arises." *Ibid.* (quoting Pet. App. 36a-37a). It is true that "happen" means to "come to pass," "take place," or "occur." 6 *OED* 1096; see 1 Webster, *American Dictionary* s.v. "happen" ("To come; to befall."); Noah Webster, *A Compendious Dictionary of the English Language* 139 (1806) ("to fall out, come to pass, chance"); 1 Johnson, *Dictionary* s.v. "happen" (similar).

But respondent elides the nature of the relevant subject—which is a "vacancy." A vacancy is not just an

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[20] Letter from Jefferson to Wilson Cary Nicholas (Jan. 26, 1802), in 36 *The Papers of Thomas Jefferson* 433 (Barbara B. Oberg ed., 2009) (emphases added).

event of an instant. It is, rather, "[t]he fact *or condition* of an office or post *being*, becoming, or falling vacant." 19 *OED* 383 (emphases added). In 1787, a vacancy was understood as a continuing "state." 2 Johnson, *Dictionary* s.v. "vacancy" ("State of a post or employment when it is unsupplied."); 2 Webster, *American Dictionary* s.v. "vacancy" ("The state of being destitute of an incumbent; want of the regular officer to officiate in a place."). Given that understanding, the state of being vacant is something that "may happen," and continue happening, as long as the office in question remains vacant. Even when the "fact" of "becoming[] or falling vacant" occurs before a recess begins, the "condition" of "being" vacant may continue to happen during the recess itself. 19 *OED* 383. Just as World War II, which began in 1939, can be said to have happened in the 1940s, so too does a vacancy happen for as long as the office's state of being vacant persists.

For those reasons, Attorney General Wirt noted in 1823 that the reference to "'vacancies that may *happen* during the recess of the Senate'" "seems not perfectly clear." 1 Op. Att'y Gen. 631, 631. On one hand, "[i]t may mean 'happen to take place:' that is, '*to originate.*'" *Ibid.* On the other, it may also mean "'happen to exist.'" *Id.* at 632. Wirt observed that the former reading "is, perhaps, more strictly consonant with the mere letter" of the Clause, but he concluded that the latter is "the only construction of the constitution which is compatible with its spirit, reason, and purpose; while, at the same time, it offers no violence to its language." *Id.* at 633-634.

b. Respondent contends (Cert. Resp. 23) that reading the word "happen" to mean "happen to exist" has the same effect as removing the phrase "that may happen"

from the Recess Appointments Clause. That is not true. Without that phrase, the Clause would give the President power to "fill up all Vacancies during the Recess of the Senate." It could then be thought to permit the President to act during a recess to fill a known *future* vacancy that results when a fixed term will expire or when an official tenders a resignation before its effective date. Construing the text to refer to vacancies that "happen to exist" (1 Op. Att'y Gen. at 633) during the recess confines the President to filling vacancies that actually do exist during the recess, and thus avoids giving him a unilateral power he has never been thought to possess.[21]

2. The Clause's purposes are best served by allowing the President to fill a vacancy that exists during a recess

As the foregoing discussion shows, the court of appeals erred in concluding that the Executive's long-standing construction is foreclosed by the constitutional text. Pet. App. 36a-37a. Attorney General Wirt and his successors have recognized that the underlying purposes of the Recess Appointments Clause supply compelling reasons to resolve its ambiguity in favor of allowing the President to fill vacancies that exist during a recess.

a. Most fundamentally, the "happen to exist" reading furthers the Recess Appointment Clause's basic object of ensuring a genuine opportunity at all times for vacancies to be filled, even if only temporarily. See 1 Op. Att'y Gen. at 633 (explaining that "the whole purpose of the

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[21] The advice-and-consent process can be used to fill future vacancies. See, *e.g.*, 61 Cong. Rec. 5724 (Sept. 21, 1921) (nomination of replacement for U.S. Attorney whose resignation was "effective October 1, 1921"); *id.* at 5737 (Sept. 22, 1921) (Senate confirmation); see also 10 Op. O.L.C. 108, 110-111 (1986) (describing nominations for prospective judicial vacancies).

constitution is completely accomplished" by reading "happen" to mean "exist"). If an unanticipated vacancy first arises on the eve of a Senate recess, it may be impossible for the President to evaluate potential permanent replacements and for the Senate to act on a nomination before the recess.

Moreover, the relatively slow speed of long-distance communication in the eighteenth century meant that the President might not have even learned of a vacancy until after the Senate's recess had already begun. If an ambassador died while abroad, the Framers could not have intended for that office to remain vacant during a months-long recess merely because news of the death did not reach the President until the Senate was already in recess. See App., *infra*, 69a (noting David Porter's death near Constantinople less than one day before recess); 1 Op. Att'y Gen. at 632 (examining the problem of a "vacancy occurring in an office, held in a distant part of the country, on the last day of the Senate's session," if the Senate adjourns "[b]efore the vacancy is made known to the President"). "If the [P]resident needs to make an appointment, and the Senate is not around, *when* the vacancy arose hardly matters; the point is that it must be filled now." Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 Cardozo L. Rev. 443, 445-446 (2005).

Nor has the underlying problem been eliminated by high-speed communications. In June 1948, the Secretary of Labor died ten days before the Senate began a five-week intra-session recess.[22] When the Senate returned for 12 days, President Truman promptly nominated a successor, but Senator Taft opposed a confirmation vote

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[22] *Lewis Schwellenbach Dies at 53*, N.Y. Times, June 11, 1948, at 1; *Congressional Directory* 528.

in August, even though the Senate was on the eve of recessing again until December 31. See p. 26, *supra*. Taft explained that a recess appointment would allow the office to be filled while the Senate followed its usual process of referring the nomination to committee. 94 Cong. Rec. at 10,187. Under the court of appeals' decision, that sensible course was unconstitutional, and the office would have had to remain vacant for the next 4½ months.[23]

b. The court of appeals' construction would also prevent the President from being able to fill offices created shortly before the Senate begins a recess. For instance, the Department of Justice and the office of the Solicitor General came into existence on July 1, 1870, only 14 days before the Second Session of the 41st Congress concluded.[24] The first Solicitor General, Benjamin Bristow, began his tenure as a recess appointee on October 11, 1870, even though that vacancy pre-existed the recess during which he was appointed.[25] Similarly, the office of the Chief of Naval Operations was established on March 3, 1915, the day before the Senate recessed *sine die*, and its first occupant was recess appointed by President Wilson on May 11, 1915, more than six months before the Senate returned.[26] The Federal Farm Board was established on June 15, 1929, four days before an intra-session recess,

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[23] The nominee was ultimately confirmed on January 31, 1949—four weeks into the Senate's next session. See 95 Cong. Rec. 718.

[24] See Act of June 22, 1870, ch. 150, §§ 2, 19, 16 Stat. 162, 165; *Congressional Directory* 525.

[25] 79 U.S. (12 Wall.) iii (1872).

[26] See Act of Mar. 3, 1915, ch. 83, 38 Stat. 929; 52 Cong. Rec. 5509; 22 Comp. Treas. 530, 531 (1916).

and President Hoover recess appointed its first eight members on July 15 and 30, 1929.[27]

c. The court of appeals suggested that the problems associated with vacancies that cannot be filled for significant periods would be ameliorated if Congress were to provide more broadly than it has for officials to serve in an "acting" capacity or be held over beyond the end of their terms until successors are confirmed. Pet. App. 44a-45a. But hold-over provisions are useless in the case of death or resignation, and the very existence of the Recess Appointments Clause shows that the Framers did not think it sufficient to have the duties of vacant offices performed by subordinate officials in an "acting" capacity. Moreover, some offices, such as Article III judgeships, cannot be performed on an acting basis at all. And it may be impractical to rely for significant periods of time on acting officials to fill other positions, such as Cabinet-level positions or positions on multi-member boards designed to be politically balanced. Especially in agencies with few political appointees, relying exclusively on acting officials would impinge on the President's ability to have persons of his own choosing in important positions and in that respect limit political accountability to the President. Cf. *Free Enter. Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3139, 3155-3157 (2010).

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[27] See ch. 24, § 2, 46 Stat. 11; 9 Comp. Gen. 190, 191 (1929); see also 9 Comp. Gen. 60, 60 (1929) (noting the positions "became vacant" on June 15).

3. Since the 1820s, the vast majority of Presidents have made recess appointments to fill vacancies that arose before a particular recess but continued to exist during that recess

a. Given the need to ensure that vacant offices can be filled when the Senate is unavailable to provide its advice and consent to nominations, Attorney General Wirt's conclusion that the President may fill vacancies that "happen to exist" during a recess has been repeatedly reaffirmed by his successors. In 1832, Attorney General Taney concluded that "[t]here is no reason" to distinguish between vacancies that occur shortly before a recess begins and those that occur during the recess, and that "the words used in the constitution do not, I think, by any fair construction, require a distinction to be taken." 2 Op. Att'y Gen. 525, 528. Similar conclusions followed in 1841 and 1846. 3 Op. Att'y Gen. 673; 4 Op. Att'y Gen. 523.

By 1862, Attorney General Bates advised President Lincoln that the question was "settled in favor of the power [to fill a vacancy existing during a recess], as far, at least, as a constitutional question can be settled, by the continued practice of your predecessors, and the reiterated opinions of mine, and sanctioned, as far as I know or believe, by the unbroken acquiescence of the Senate." 10 Op. Att'y Gen. 356, 356. On October 17, 1862, Lincoln made a recess appointment of David Davis as a Justice on this Court, filling a slot that had remained vacant throughout three sessions of the 37th Congress.[28]

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[28] Brian McGinty, *Lincoln and the Court* 117 (2008) (commission date); Federal Judicial Center, *Biographical Directory of Federal Judges*, entry for John Archibald Campbell, available from www.fjc.gov/public/home.nsf/hisj (predecessor's April 30, 1861, resignation); *Congressional Directory* 525 (intervening sessions).

In 1880, a few months before he became a member of this Court, then-Judge Woods held that the President had the constitutional power to appoint a U.S. Attorney "notwithstanding the fact that the vacancy filled by his appointment first happened when the senate was in session." *In re Farrow*, 3 F. 112, 116 (C.C.N.D. Ga.). He acknowledged a contrary opinion by one district judge, but found that it could not "outweigh the authority of [ten Attorney General opinions], and of the practice of the executive department for nearly 60 years, the acquiescence of the senate therein, and the recognition of the power claimed by both houses of congress." *Id.* at 115 (discussing *Case of the Dist. Att'y of the United States*, 7 F. Cas. 731 (E.D. Pa. 1868) (No. 3924)). That same year, when Attorney General Devens issued a lengthy opinion sustaining the practice (16 Op. Att'y Gen. 522), it was reported that President Hayes had made "quite a number of [recess] appointments" to vacancies that preexisted the recess. *Recess Appointments*, Wash. Post, July 7, 1880, at 1.

Since then Attorneys General (and Assistant Attorneys General) have repeatedly endorsed Wirt's reasoning and conclusion, as have the Second, Ninth, and Eleventh Circuits. See *Evans*, 487 F.3d at 1226-1227 (11th Cir.) (en banc); *Woodley*, 751 F.2d at 1012-1013 (9th Cir.) (en banc); *Allocco*, 305 F.2d at 709-715 (2d Cir.); see also, *e.g.*, 41 Op. Att'y Gen. at 468 (1960); 30 Op. Att'y Gen. 314 (1914); 26 Op. Att'y Gen. 234 (1907); 17 Op. Att'y Gen. 521 (1883); 20 Op. O.L.C. at 161 (1996); 13 Op. O.L.C. 271, 272 (1989); 6 Op. O.L.C. at 586 (1982); 3 Op. O.L.C. 314 (1979).

b. As *Farrow* indicated, the restrictions that Congress has placed on salary payments to recess appointees who fill pre-existing vacancies have long been seen

as a form of congressional acquiescence in such appointments, because those restrictions are predicated on the existence of the underlying presidential power to make the appointments. See *Farrow*, 3 F. at 115 (discussing 1863 statute); see also 41 Op. Att'y Gen. at 466 (noting that the 1863 statute "implicitly assumed that the power [to fill preexisting vacancies] existed"); 16 Op. Att'y Gen. at 531 ("This legislation * * * must be deemed a recognition by Congress of the invariable construction given by the Presidents to the power of appointment conferred upon them by the Constitution."). The original Pay Act postponed the payment of recess appointees who filled vacancies that first arose while the Senate was in session, deferring their salaries until confirmation. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 646. But Congress later relaxed the statute to provide conditions under which even such appointees are to be paid before confirmation. See Act of July 11, 1940, ch. 580, 54 Stat. 751. Had it believed such appointments were unconstitutional, Congress presumably would have tried to go much further to restrict them. Cf. Tenure of Office Act, ch. 154, § 3, 14 Stat. 430-431 (purporting to limit recess-appointment power to vacancies that happen "by reason of death or resignation").

c. The practice of making an appointment during a recess to fill a vacancy that pre-dated that recess is so well and long established that it is impossible to determine how many such appointments have occurred in the last 190 years. Indeed, both before and after Wirt's 1823 opinion for President Monroe, records were not ordinarily kept in a fashion that clearly establishes when the underlying vacancies first arose. When Presidents nominated recess appointees, their nominations often, but not always, indicated who previously occupied the posi-

tion, but they almost never indicated when the predecessor had vacated the office. See, *e.g.*, S. Exec. Journal, 2d Cong., 2d Sess. 125-126 (1792); *id.*, 7th Cong., 2d Sess. 400-404 (1802).

Nevertheless, we may confidently say that at least 35 of President Monroe's 38 successors have, consistent with the long-standing views of their Attorneys General, made some recess appointments to fill offices that were vacant before the recesses in which they acted. See App., *infra*, 67a-89a (identifying illustrative appointments). The list includes every President since Buchanan.

The court of appeals erred in failing to give any weight to 190 years of Executive practice, in which the Legislature has been seen as acquiescing for nearly 150 years. As discussed above, the long-held positions of the political Branches on a matter of constitutional interpretation are entitled to substantial respect under this Court's precedent, particularly when related to separation of powers. See *Mistretta*, 488 U.S. at 401. As with all "constitutional provision[s] the phraseology of which is in any respect of doubtful meaning," the construction of the Recess Appointments Clause should now be strongly informed by those many decades of "settled and established practice." *The Pocket Veto Case*, 279 U.S. at 689-690 (internal quotation marks omitted).

4. Before 1823, there was no settled understanding that the President was precluded from filling vacancies during a recess that first arose before that recess began

The court of appeals believed its departure from long-established practice was justified by "evidence of the earliest understanding of the Clause," Pet. App. 38a, which it found in a 1792 opinion of Attorney General Randolph, a 1799 letter of Alexander Hamilton, and floor

statements from a single Senator in 1814, *id.* at 38a-40a. There was, however, no such settled "earliest understanding," and therefore nothing that could suffice to outweigh the deeply engrained practice discussed above. To the contrary, the issue was repeatedly subject to debate or uncertainty during the administrations of all four of Monroe's predecessors. And each of those Presidents made appointments, or expressed views, that were inconsistent with the court of appeals' categorical conclusion that a vacancy cannot be filled if it first arose before that recess.

a. During the Washington administration, Attorney General Randolph expressed the position that, even though the office of Chief Coiner of the Mint was vacant, the President could not make a recess appointment because the vacancy had "commenced" or "may be said to have *happened*" on April 2, 1792, when the office was created, and Congress had remained in session between then and May 8.[29]

Yet, within the next five years, President Washington himself made at least two recess appointments to fill vacancies that had first arisen before the recesses in which they were filled. On November 23, 1793, Washington commissioned Robert Scot as the first Engraver of the Mint—a position that had been created in 1792 by the same statute Randolph had addressed but had never been filled.[30] And on October 13, 1796, Washington re-

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[29] Edmund Randolph's Opinion on Recess Appointments (July 7, 1792), in 24 *The Papers Of Thomas Jefferson* 166 (John Catanzariti ed., 1990).

[30] See Monroe H. Fabian, *Joseph Wright: American Artist, 1756-1793*, at 61-62 (1985) (explaining that Joseph Wright was performing some engraver duties, but was never commissioned before his death in September 1793); 27 *The Papers of Thomas Jefferson* 192 (John

cess-appointed William Clarke to be the United States Attorney for Kentucky, an office that had been vacant, even under Randolph's reasoning, for two years.[31]

b. In the Adams administration, the question recurred, when Secretary of War James McHenry expressed doubts about whether the President could, in the absence of express statutory authority, make recess appointments for certain offices in the Army that had not been filled while the Senate was in session.[32] Alexander Hamilton responded that newly created offices were not "vacanc[ies]" at all, because they had not previously been filled, and also that "the President cannot fill a vacancy which happens during a session of the Senate."[33] Attorney General Lee concluded that there was statutory

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Catanzariti ed., 1997) (noting Scot's commission); S. Exec. Journal, 3d Cong., 1st Sess. 142-143 (1793) (naming no predecessor in Scot's nomination); Act of Apr. 2, 1792, ch. 16, § 1, 1 Stat. 246.

[31] U.S. Dep't of State, *Calendar of the Miscellaneous Letters Received By The Department of State* 456 (1897); S. Exec. Journal, 4th Cong., 2d Sess. 217 (1796); Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky 1789-1816*, at 70-73 (1978). As the court of appeals noted (Pet. App. 38a-39a), Randolph considered a vacancy as arising anew if someone who had been confirmed and commissioned declined to accept the commission, but that theory would not support Washington's appointments of Scot and Clarke. The Senate Executive Journal reflects no nominations for the Engraver's position before Scot's appointment, and no nominations for the Kentucky position after William McClung was confirmed on June 2, 1794. S. Exec. Journal, 3d Cong., 1st Sess. 160. McClung had declined that appointment by October 1794. Tachau, *Federal Courts* at 72.

[32] Letter from McHenry to Hamilton (Apr. 26, 1799), in 23 *The Papers of Alexander Hamilton* 69-71 n.1 (Harold C. Syrett ed., 1976).

[33] Letter from Hamilton to McHenry (May 3, 1799), in *id.* at 94-95.

authority to make the appointment.[34] President Adams himself, however, indicated a contrary view, writing that his authority stemmed not from a statute but from "the Constitution itself. Whenever there is an office that is not full, there is a vacancy, as I have ever understood the Constitution. * * * I have no doubt that it is my right and my duty to make the provisional appointments."[35] A month later, given the "difference of opinion concerning the construction of the constitution," Adams concluded that there was "no necessity for an immediate appointment" and agreed "to suspend it for the present, perhaps till the meeting of the Senate."[36] Later, however, Jefferson said Lee had informed him that, in the Adams administration, "whenever an office became vacant so short a time before Congress rose, as not to give an opportunity of inquiring for a proper character, they let it lie always till recess"[37]—a view that cannot be reconciled with the decision below.

c. President Jefferson appears to have made recess appointments to vacancies first arising before the recess in which he was acting. For instance, in 1801, he recess-appointed Walter Jones, Jr., as the District Attorney for the District of the Potomac and George Dent as the Marshal for the same district.[38] Those positions had been

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[34] *Id.* at 95 n.2.

[35] Letter from Adams to McHenry (Apr. 16, 1799), in 8 *The Works of John Adams* 632-633 (Charles Francis Adams ed., 1853).

[36] Letter from Adams to McHenry (May 16, 1799), in *id.* at 647.

[37] 36 *Jefferson Papers* at 433 (letter to Nicholas).

[38] See S. Exec. Journal, 7th Cong., 1st Sess. 400-401 (1802) (noting commission issued to Jones during "the late recess"); Letter from Levi Lincoln to Jefferson (Apr. 9, 1801), in 33 *The Papers of Thomas Jefferson* 558 (Barbara B. Oberg ed., 2006) (noting Dent's acceptance of Marshal position); U.S. Marshals Service, *State-by-State*

created during the prior Session of Congress.[39] The same is true for Jefferson's recess appointments of the District Attorney and Marshal for the District of Ohio.[40] And Jefferson may have made additional appointments inconsistent with the decision below.[41]

In any event, there is no evidence that Jefferson viewed the construction of the Clause as settled, much less that he deemed Randolph's opinion as authoritative. Rather, Jefferson acknowledged that the Clause "is certainly susceptible of both constructions" discussed above; he suggested that his administration should eventually attempt to "establish a correct & well digested rule," but he concluded, in January 1802, that it was "better to give the subject a go-by for the present."[42]

d. President Madison also filled several pre-existing vacancies during recesses. In 1813, a district judge left office shortly before the end of the Senate's session; Madison then issued a commission to Theodore Gaillard

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Chronological Listing of United States Marshals: Washington, D.C. 2, available from www.usmarshals.gov/readingroom/us_marshals (noting Dent's April 4, 1801 recess appointment).

[39] See Act of Feb. 13, 1801, ch. 4, §§ 21, 36-37, 2 Stat. 96-97, 99-100. In the "key" that he created for his January 6, 1802, list of nominees, Jefferson included Jones and Dent's recess-appointed successor (William Baker) in the group of appointees for "vacancies *unfilled*, or newly occurring"—a category separate from those for "resignation, declining or death," "midnight appointments" (that Jefferson had revoked), and "removals." 36 *Papers of Thomas Jefferson* 328, 332 (emphasis added).

[40] *Id.* at 328, 331, 332 (including "William Mc.Millan" and "James [T]indlaye" in the "vacancies unfilled" portion of the key and noting recess appointments); Act of Feb. 13, 1801, ch. 4, §§ 4, 36-37, 2 Stat. 89-90, 99 (creating positions on February 13, 1801).

[41] Hartnett, 26 Cardozo L. Rev. at 391-400.

[42] 36 *Jefferson Papers* at 433 (letter to Nicholas).

to fill that vacancy during the recess.[43] On March 3, 1815, before the Senate adjourned *sine die*, President Madison signed a statute that created new positions for the District Attorney and Marshal for the Northern District of New York. Ch. 95, 3 Stat. 235; S. Journal, 13th Cong., 3d Sess. 689-690 (1815). Although those vacancies first arose while the Senate was in session, Madison made recess appointments to fill both of them. See S. Exec. Journal, 14th Cong., 1st Sess. 19 (1816) (noting recess appointments of Roger Skinner and John W. Livingston). Otherwise, the new positions would have gone unfilled for at least eight months, until the Senate returned. See *Congressional Directory* 523. Madison also recess appointed the first United States Attorney and Marshal for the Territory of Michigan in 1815—more than *two years* after those positions were created.[44]

The court of appeals quoted an 1814 Senate floor debate that followed Madison's recess appointments of three ministers to participate in negotiations in Russia to end the War of 1812—ministers whose offices had not been established by statute. Pet. App. 40a. Senator Christopher Gore argued that there was no "vacancy" for the President to fill when an office had never previously been occupied. 26 Annals of Cong. 651 (1814). In the course of debate, he stated that the Recess Appointments Clause "specifies the precise space of time wherein the vacancy must happen." *Id.* at 653. But Gore was vigorously opposed by Senators William Bibb and Outerbridge Horsey, and Gore's resolution to denounce the President's appointments was not adopted. *Id.* at 694-

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[43] Hartnett, 26 Cardozo L. Rev. at 400-401.

[44] Act of Feb. 27, 1813, ch. 35, 2 Stat. 806; S. Exec. Journal, 14th Cong., 1st Sess. 19 (1816).

722, 741-759. Thus, the debate hardly shows that the Senate's view differed from the President's.

e. The court of appeals thus erred in believing that the overwhelmingly predominant reading of the Recess Appointments Clause since 1823 could be rejected on the premise "that early interpreters read 'happen' as 'arise.'" Pet. App. 42a. There was no such consensus among early interpreters. There were instead repeated indications—including actual appointments—that early Presidents were amenable to the view that later swept the field.

This Court should reverse the court of appeals' holding that recess appointments cannot be made to fill a vacancy that first arises before the recess in which the President acts.

C. The Senate Is In "Recess" For Purposes Of The Recess Appointments Clause When, For 20 Days, A Senate Order Provides For Only Fleeting, Concededly "Pro Forma" Sessions At Which "No Business" Is To Be Conducted

As an alternative ground for affirming the judgment below, respondent contends (Cert. Resp. 29-33) that the Senate was not in recess on January 4, 2012, for purposes of the Recess Appointments Clause, because its pro-forma sessions transformed what would have been a 20-day recess into a series of three-day breaks (not counting Sundays), each of which was, in isolation, too short to constitute a recess covered by the Clause.[45] Yet re-

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[45] Sundays are expressly "excepted" from the Pocket Veto Clause (Art. I, § 7, Cl. 2), but not from other provisions that specify a certain number of days. See Art. I, § 5, Cl. 4 (Adjournment Clause); Amend. XXV, § 4 (Presidential Inability). Congress has nevertheless excluded Sundays from many of its calculations, which accounts for respondent's description of the three- and four-day breaks here as three days. Cert. Resp. 3 n.1.

spondent does not and cannot dispute the essential facts supporting the President's conclusion that the Senate was in recess under the ordinary and traditional understanding of the Recess Appointments Clause: throughout the 20-day period, the Senate had undertaken to conduct "no business" and was no more available to sit as a body than it is during a traditional intra-session recess. Contrary to respondent's view, the Senate cannot thus unilaterally extinguish the President's constitutional authority to make recess appointments while simultaneously shirking its constitutional responsibility to be available to provide advice and consent.

1. The Senate is in recess when it cannot receive communications from the President or participate as a body in the appointment process

Respondent has not disputed that a 20-day recess would, under long-accepted standards, be a sufficient break in the Senate's ability to provide advice and consent to enable the President to make recess appointments. See Resp. C.A. Br. 30-35 (arguing that, to be in recess, the Senate must, at a minimum, adjourn for more than three days). For more than 90 years, the Senate and the Executive have agreed on a functional understanding, under which short intra-session breaks of three or fewer days do not trigger the Recess Appointments Clause, but longer breaks can do so.

As discussed above (see p. 24, *supra*), the Senate Judiciary Committee explained in 1905 that, for Recess-Appointments-Clause purposes, a "recess" exists during "the period of time when" the Senate's "members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments." *1905 Senate Report* 2. The committee

thus rejected the proposition that there had been a "constructive" inter-session recess when the Senate was in active session at noon on December 7, 1903, and by operation of law one session automatically terminated and the next was initiated. *Id.* at 3. There had in fact been "no time" in which the Senate was not "in session to receive any nomination or message [the President] might communicate," and therefore no recess. *Ibid.* Just as there was no such thing as a "constructive session" of the Senate, the committee said there could be no such thing as a "constructive recess." *Id.* at 2.

In 1921, Attorney General Daugherty relied on that report, and the same factors, to conclude that the President may make recess appointments during a 28-day intra-session recess. 33 Op. Att'y Gen. at 24-25. He concluded it was reasonable for the President to determine that "there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate." *Id.* at 25. In a passage that he described as "unnecessary" to his decision, Daugherty also suggested that an "adjournment for 5 or even 10 days" would not constitute a qualifying recess. *Id.* at 24, 25. Daugherty's analysis has continued to govern the Executive's approach, providing the basis for appointments by multiple Presidents during intra-session recesses as short as ten days. See *OLC Pro Forma Op.* 5-9; *id.* at 7 (noting that the last five Presidents have all made appointments during intra-session recesses of 14 or fewer days).

In 1929, this Court adopted a similar approach with respect to the Pocket Veto Clause (Art. I, § 7, Cl. 2), which addresses circumstances in which Congress renders itself unavailable to participate in the legislative process before the end of the ten-day period that the Constitution affords the President to review a bill. The

Court held that the President is required to return a bill to the relevant House of Congress only when that House is "sitting in an organized capacity for the transaction of business." *The Pocket Veto Case*, 279 U.S. at 683. As the Court explained, the House is not available in the constitutionally relevant sense "when it is not in session *as a collective body* and its members are dispersed." *Ibid.* (emphasis added).[46]

2. Despite the pro-forma sessions, the 20-day period at issue here bore the hallmarks of a recess

Respondent contends (Cert. Resp. 31) that the January 2012 pro-forma sessions were materially indistinguishable from the Senate's regular sessions. But that is plainly not so. As the pro-forma moniker indicates, the sessions were "[h]eld, made, or done (merely) as a matter of form." *Oxford English Dictionary* s.v. "pro forma" (3d ed. June 2007), www.oed.com/view/Entry/238153; see 158 Cong. Rec. S5954 (daily ed. Aug. 2, 2012) (Congressional Research Service report describing "'pro forma' sessions" as "held for the sake of formality"). In actuality, the entire period from January 3 to 23, 2012, bore the hallmarks of a single 20-day recess during which no work was done, no messages were laid before the Senate, and its members were dispersed.

a. The December 17, 2011, unanimous-consent order (Pet. App. 91a-92a) addressed two periods: one at the end of the First Session of the 112th Congress, and one

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[46] The Court later held that an adjournment of only three days did not make the Senate unavailable for purposes of the Pocket Veto Clause. See *Wright* v. *United States*, 302 U.S. 583 (1938). But it stressed that the bill in question had in fact been "laid before the Senate" two days after the President returned it and that the Court's holding did not apply to an adjournment for longer than three days. *Id.* at 593, 598.

at the beginning of the Second Session. The division between the First and Second Sessions was effectuated by Section 2 of the Twentieth Amendment at noon on January 3, 2012. See *Jefferson's Manual* § LI, at 166. The Senate's order expressly provided that, throughout both periods, the Senate would "convene for pro forma sessions only, with no business conducted," at specified times on each Tuesday and Friday between December 19, 2011, and January 20, 2012. Pet. App. 91a. Then, according to the order, the Senate would convene on January 23, 2012, in a session that would include "the prayer and pledge," "leader remarks," "morning business," and "executive session." *Id.* at 91a-92a. As relevant here, the December 17 order barred the Senate as a body from conducting any business—including providing advice and consent on Presidential nominations—for the entire 20-day period between the start of the Second Session of the 112th Congress at noon on January 3 and the Senate's next regular session on January 23.

During that 20-day period, the Senate conducted no business whatsoever. It considered no bills, passed no legislation, and voted on no nominees.[47] No speeches were made, and no debates were held. Each pro-forma session lasted no more than 30 seconds. For instance, on January 6, 2012, a virtually empty chamber was gaveled into pro-forma session by Senator Webb; the assistant bill clerk read a one-sentence letter from the President pro tempore directing Senator Webb to "perform the duties of the Chair"; and Senator Webb immediately adjourned the Senate until January 10. See 158 Cong. Rec. S3 (daily ed.). The entire "session" lasted 29 se-

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[47] As discussed below (see p. 52 & n.49, *infra*), the Senate did pass legislation in the First Session on a day when it had been scheduled to hold a pro-forma session.

conds, *ibid.*, and, as far as the video reveals, no other Senator was present, see *Senate Pro Forma Session, Jan. 6, 2012*, C-SPAN, www.c-spanvideo.org/program/303538-1. The next four pro-forma sessions followed the same pattern and ranged from 28 to 30 seconds.[48]

When the Senate finally convened for a regular session on January 23, it began with a prayer and the Pledge of Allegiance. 158 Cong. Rec. S13 (daily ed.). The Acting President pro tempore recognized the Majority Leader, who "welcome[d] everyone back after the long break we had." *Ibid.* The Senate engaged in morning business and executive session, during which it confirmed a judicial nominee. *Id.* at S13-S48. Messages from the President and the House of Representatives that had arrived on January 12 and January 18 were formally laid before the Senate, as were committee reports that had been submitted on January 13. *Id.* at S37, S41.

Thus, just as its order had prescribed, before January 23, the Senate spent 20 days conducting "no business." Pet. App. 91a. That period not only satisfied the plain meaning of the term "recess": a "period of cessation from usual work" (13 *OED* 322-323), or a "suspension of business" (2 Webster, *American Dictionary* s.v. "recess"). It also satisfied the test discussed above, because Senators evidently understood that they "owe[d] no duty of attendance" and they were unable as a body to "receive communications from the President or participate as a body in making appointments." *1905 Senate Report* 2.

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[48] See 158 Cong. Rec. S5 (daily ed. Jan. 10, 2012) (28 seconds); *id.* at S7 (Jan. 13) (30 seconds); *id.* at S9 (Jan. 17) (28 seconds); *id.* at S11 (Jan. 20) (29 seconds).

b. The Senate's own rules and procedures reinforce the conclusion that the pro-forma sessions were a stratagem to paper over what was in substance a continuous Senate recess of 20 days. Senate Rule IV, para. 1(a), requires the recitation of a prayer and the Pledge of Allegiance at the start of each "daily session[]," but neither was said at the pro-forma sessions. Similarly, under the terms of the Senate's usual standing order, the Secretary of the Senate is authorized "to receive messages from the President of the United States" when "the Senate is in recess or adjournment." 157 Cong. Rec. S14 (daily ed. Jan. 5, 2011); see also *ibid.* (similar order for certain messages from the House). Messages are laid before the Senate only when it returns. Here, the Secretary invoked the standing order to receive messages from the President and the House on January 12 and 18, and those messages were not laid before the Senate as a body until January 23 (see 158 Cong. Rec. at S37), indicating that the intervening pro-forma sessions had been indistinguishable from—rather than interruptions of—an ongoing recess.

Other orders the Senate adopted on December 17, 2011, further support the conclusion that the pro-forma sessions did not interrupt the Senate's ongoing recess. By rule and practice, it is only while the Senate is in session in its chamber that Senate committees may report bills and submit reports to the full Senate for placement on the legislative calendar, that the Senate may make legislative appointments to certain boards and commissions, and that the President pro tempore may sign enrolled bills. Before lengthy recesses, however, the Senate regularly adopts orders allowing such acts to occur while the Senate is away. See *Riddick's Senate Procedure* at 925, 1193 (committee reports); *id.* at 427 (legisla-

tive-appointment authority); *id.* at 830, 1023 (signing of enrolled bills). On December 17, 2011, the Senate adopted such orders, notwithstanding the fact that it was planning to hold several pro-forma sessions over the next 36 days. See 157 Cong. Rec. at S8783. And other orders tellingly characterized the upcoming break as "the Senate's recess" (*i.e.*, as a unitary recess, rather than a series of three-day breaks). *Ibid.* (asking and obtaining "unanimous consent that *notwithstanding the Senate's recess*, committees be authorized to report legislative and executive matters on Friday, January 13, 2012, from 10 a.m. to 12 noon.") (emphasis added); see *ibid.* (authorizing Senate leadership to exercise legislative-appointment authority "notwithstanding the upcoming recess or adjournment of the Senate"). If respondent were correct that pro-forma sessions are "not materially different from other Senate sessions" (Cert. Resp. 31 (citation omitted)), those orders would have been unnecessary, because committees could have reported, and legislative appointments could have been made, during the period of pro-forma sessions without any need for a special dispensation.

c. Under the circumstances, it was entirely reasonable for the President to rely on the Senate's order that no business would be conducted during its 20-day January break and its repeated descriptions of that impending break as "the Senate's recess." See *United States* v. *Smith*, 286 U.S. 6, 35-36 (1932) (explaining that "[i]t is essential to the orderly conduct of public business * * * that each branch be able to rely upon definite and formal notice of action by another"; warning against the "uncertainty and confusion" of requiring the President to "determin[e] through unofficial channels" the meaning of a Senate communication).

3. *The mere possibility that the Senate might suspend its "no business" order during the 20-day period did not prevent that period from constituting a recess*

Respondent notes (Cert. Resp. 31-32) that, at any one of its pro-forma sessions, the Senate might have overturned its unanimous-consent order directing that "no business" be conducted before January 23, 2012. In particular, respondent stresses (*ibid.*) that the Senate did conduct business, by passing a bill, during a December 2011 session, which, in the same order, had been scheduled to be a pro-forma session. But the remote possibility that unanimous consent to conduct business would be obtained, despite the December 17 order, cannot suffice to prevent an extended break from being a "recess" in the relevant sense, because the possibility of reconvening early exists during traditional intra-session—and even inter-session—recesses that take place pursuant to concurrent resolutions.[49]

A valid exercise of the recess-appointment power cannot be made to depend on a demonstration that the Senate would be *incapable* of resuming regular business during the relevant recess. Indeed, the Senate ordinarily retains the potential to conduct business before the end of recesses effectuated by concurrent resolutions of adjournment.[50] Such resolutions typically provide—even

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[49] The Congressional Research Service identified 114 pro-forma meetings between January 4, 2005, and March 8, 2012, and found only "two at which legislative business appears to have been conducted." 158 Cong. Rec. at S5954; see 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011) (passing Airport and Airway Extension Act of 2011); *id.* at S8789 (daily ed. Dec. 23, 2011) (passing Temporary Payroll Tax Cut Continuation Act of 2011).

[50] See, *e.g.*, H.R. Con. Res. 225, 109th Cong. (July 28, 2005) (providing for adjournment between July 29 and September 6, 2005, but

for adjournments *sine die*—that the congressional leadership may require either or both Houses to resume business during the recess if the public interest warrants; those are, in legislative parlance, "conditional adjournment resolutions."[51] In addition, the President may always require the Senate to terminate its recess and resume regular business "on extraordinary Occasions." U.S. Const. Art II, § 3. But the mere possibility that congressional leadership or the President might require the Senate to resume business cannot mean that the Senate is not in recess, for then it could *never* be in recess.

Despite respondent's efforts to mask the substance of the Senate's actions, the traditional and established understanding of the Recess Appointments Clause applies with equal force in this setting. The Senate here had unequivocally ordered a cessation of business between January 3 and January 23. To the extent the Senate had the ability to conduct emergency business during its break, it was not because the Senate expressed any in-

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allowing for early recall); 151 Cong. Rec. 19,417 (2005) (reconvening early from intra-session recess after Hurricane Katrina); 156 Cong. Rec. S6990 (daily ed. Aug. 5, 2010) (passing concurrent resolution giving Senate majority leader power to reassemble the Senate); *id.* at S6995, S6996-S6999 (daily ed. Aug. 12, 2010) (Majority Leader exercising recall authority to permit Senate to pass an emergency border security appropriation); *Riddick's Senate Procedure* at 1082-1083 (listing instances when "[b]y order, adopted by unanimous consent, the Senate has transacted * * * business during recess").

[51] See H.R. Doc. No. 111-157, John V. Sullivan, *Constitution, Jefferson's Manual & Rules of the House of Representatives*, § 84, at 38 (2011) ("A concurrent resolution adjourning both Houses for more than three days, or sine die, normally includes joint leadership authority to reassemble the Members whenever the public interest shall warrant it.").

tent to do so, or because of anything distinctive about the pro-forma sessions. Rather, that result was merely a function of the fact that, under general Senate procedures, unanimous-consent agreements can always be overridden by unanimous consent. The December 17 order thus created a state of affairs in the Senate identical to those produced by a conditional adjournment resolution: the Senate was in recess, but might have resumed business if the public interest required.

In fact, resuming business under unanimous-consent orders is likely to be more difficult than doing so under the usual terms of a conditional adjournment resolution. The latter can be done by Senate leadership, or Senate and House leadership acting together, even in the face of objecting members, while the former could be blocked by a single Senator.[52] In practice, a Senator need not even be in the Senate chamber to block a proposed unanimous-consent agreement.[53] That attribute of the December 17 order was likely essential for its adoption,

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[52] See Martin B. Gold, *Senate Procedure & Practice* 24 (2d ed. 2008).

[53] Before a bill, resolution, or nomination is presented on the Senate floor for unanimous consent, it customarily passes through an extensive clearance process. See Christopher M. Davis, Cong. Res. Serv., *Memorandum re: Calling Up Measures on the Senate Floor* (2011); Gold, *Senate Procedure & Practice* at 15 & 236 n.12. Among other things, the Senate Majority Leader contacts each Senator's office through "a special alert line called 'the hotline' that provides information on [the measure] the leader is seeking to pass through unanimous consent." Sen. Tom Coburn, *Holding Spending*, www.coburn.senate.gov/public/index.cfm/holdingspending. A Senator can invoke "his unilateral ability to object to unanimous consent requests" by imposing a "hold" on a measure or matter "in advance and without having to do so in person on the floor." Gold, *Senate Procedure & Practice* at 84-85 (citation omitted).

because it gave Senators some assurance that they could leave Washington, D.C., without concern that any business would be conducted without their consent.

4. Historical practice does not support the use of pro-forma sessions to prevent the President from making recess appointments

a. Respondent notes that there is prior history of the Senate's using pro-forma sessions for short periods in an attempt to avoid adjourning for more than three days without the consent of the House of Representatives, as a means of complying with the Twentieth Amendment's requirement to assemble when a new session begins on January 3, and to achieve other purposes wholly internal to the Legislative Branch. See, *e.g.*, Cert. Resp. 3 n.2 (citing 1949 pro-forma session); 133 Cong. Rec. 15,445 (1987) (scheduling a single pro-forma session to allow a cloture vote to ripen); 158 Cong. Rec. at S5954-S5955 (summarizing reasons for some prior pro-forma sessions).[54]

Since 2007, however, the Senate has often used pro-forma sessions to paper over substantial breaks in Senate business, including at times (like the winter holidays and August) when, as a matter of traditional practice, there would have been a concurrent resolution of adjournment authorizing the Senate to cease business. See 158 Cong. Rec. at S5955 (describing breaks of 31, 34, 43, 46, and 47 days that included pro-forma sessions); *Congressional Directory* 537-538. In such instances, the pro-forma-session device has become an alternative means by which the Senate as a body ceases business—including the giving of advice and consent to appoint-

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[54] As discussed below, whatever the force of such sessions for those purposes, they cannot control the authority of the other Branches.

ments—for an extended and continuous period, enabling Senators to return to their States without concern that business will be conducted in their absence without their consent.

b. In respondent's view, the "explicit purpose" of the pro-forma sessions in December 2011 and January 2012 was not an internal legislative one, but a desire to deny the President the authority to make recess appointments. Resp. C.A. Br. 59; *id.* at 8-9 (citing letter from 20 Senators asking the Speaker of the House to prevent the Senate from adjourning for more than three days, and letter from 78 Representatives urging prevention of recess appointments); cf. *OLC Pro Forma Op.* 2 (citing statements from Senator Reid attributing that purpose to pro-forma sessions in 2007 and 2008).[55]

Respondent attempts (Cert. Resp. 30) to trace the use of recess-appointment-preventing pro-forma sessions back to 1985, contending that "Presidents Reagan and [George W.] Bush recognized the Senate's authority to preclude recess appointments by convening in pro forma sessions, as did President Obama at the beginning of his Administration."

There is no basis for concluding that President Reagan recognized the validity of such a gambit. Respondent invokes (Cert. Resp. 4) a 1999 floor statement by Senator Inhofe purporting to describe the parameters

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[55] To the extent that Members of the House of Representatives sought to prevent the President from making recess appointments, that only increases separation-of-powers concerns, as the Constitution gives the House no share of the appointment power. See *The Federalist No. 77*, at 519 (Hamilton) (the House's "unfitness" for participating in the "power of making [appointments]" "will appear manifest to all, when it is recollected that in half a century it may consist of three or four hundred persons").

of a 1985 compromise, in which President Reagan agreed to give the Senate leadership advance notice of recess appointments. See generally 131 Cong. Rec. 27,686-27,689 (1985) (Sen. Byrd). But the agreement was not, as respondent believes, intended to give the Senate an opportunity to block the recess appointments "by not going into recess and staying in pro forma." Cert. Resp. 4 (quoting 145 Cong. Rec. 29,915 (1999) (Sen. Inhofe)). Instead, as indicated by contemporaneous documents that are now publicly available, the President "agreed only to advise [Senate leaders] of recess appointments before they were made, *not* before the Senate adjourned."[56] Thus, the arrangement did not reflect any acknowledgment that the Senate could legitimately use pro-forma sessions to block recess appointments.

Respondent's assertion (Cert. Resp. 30) that President George W. Bush "recognized the Senate's authority to preclude recess appointments by convening in pro forma sessions" is likewise flawed. The fact that President Bush did not make recess appointments while the Senate was holding pro-forma sessions merely reflects the truism that the advice-and-consent process engages political leaders in a long course of repeated interactions, in which short-term compromises can be made despite

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[56] Memorandum from Fred F. Fielding, Counsel to the President, to M.B. Oglesby, Jr., Assistant to the President, Dec. 17, 1985, www.reagan.utexas.edu/roberts/Box47JGRRecessAppointments8.pdf; see also Memorandum for the Files from Max L. Friedersdorf & Fred F. Fielding, Oct. 17, 1985, www.reagan.utexas.edu/roberts/Box47JGRRecessAppointments8.pdf ("At no time did we pledge to advise Senator Byrd of plans to recess appoint *before* the recess occurs. We did indicate that he (Byrd) would be advised *at the time* of the recess appointment.").

disagreements.[57] Thus, after the recess appointments at issue here (but before the decision below), the President and the Senate reached another inter-Branch accommodation, in which the Senate agreed "to approve a slate of nominees," while the President "promis[ed] not to use his recess powers" during the Easter recess. Stephen Dinan, *Congress Puts Obama Recess Power to the Test*, Wash. Times, Apr. 2, 2012, at A3. And, in July 2013, another political compromise led to the confirmation of nominees for all five positions on the Board. See note 3, *supra*.

Respondent also relies (Cert. Resp. 4-5, 30) on a post-argument letter that the Solicitor General filed in this Court in *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635 (filed Apr. 26, 2010) (No. 08-1457). That letter principally explained that, for a variety of reasons, then-recent recess appointments did not affect prior Board decisions and orders and thus did not render the case moot. *Id.* at 1-3. The letter added that the Board might again have only two members at some point, making "the need for prospective guidance" from the Court important. *Id.* at 3. The letter observed that the Senate might foreclose the President's use of recess-appointment authority by declining to go into recess for more than three days. *Ibid.* As an example, it added—in one sentence and without further analysis—that the Senate declined to recess for more than three days for an extended period beginning in late 2007, in evident refer-

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[57] In October 2010, a former Acting Assistant Attorney General and Deputy Assistant Attorney General in the Bush administration wrote that "the Senate cannot constitutionally thwart the president's recess power through pro forma sessions." Steven G. Bradbury & John P. Elwood, *Recess is canceled: President Obama should call the Senate's bluff*, Wash. Post, Oct. 15, 2010, at A19.

ence to the Senate's practice of convening pro-forma sessions during that period. *Ibid.* That observation, in the course of a letter principally addressed to other subjects, was not aimed at definitively resolving the issue in this case. Since then, the Office of Legal Counsel conducted a thorough examination of the implications of the Senate's efforts to convene pro-forma sessions at which no business is to be conducted, and it concluded that such sessions do not interrupt a Senate recess for purposes of the President's recess-appointment power. *OLC Pro Forma Op.* 9-23. The Board's position here is consistent with that analysis.

In any event, the short period between the Solicitor General's April 2010 letter and the President's January 2012 appointments furnishes scarce material for the historical mantle that respondent attempts to don. To the contrary, this is an instance in which the Senate's previous and "prolonged reticence" to assert that the President's recess-appointment power could be so easily nullified would be "amazing if such [an ability] were not understood to be constitutionally proscribed." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995).

5. ***Even assuming the pro-forma sessions could satisfy the Senate's other constitutional obligations, they impermissibly disrupt the balance struck by Article II***

Finally, respondent contends (Cert. Resp. 3-4, 32) that the Senate has used pro-forma sessions in efforts to comply with its obligation under the Adjournment Clause (Art. I, § 5, Cl. 4) not to adjourn for more than three days without the House's consent. Respondent apparently believes that, if pro-forma sessions count for purposes of the Adjournment Clause, they must count for purposes of the Recess Appointments Clause. Yet the better view is that pro-forma sessions do not comply

with the Adjournment Clause. And, even if they do, the deference that Congress may receive on that question, which is principally related to its internal matters, is inapplicable to the Recess Appointments Clause, which allocates power between the Senate and the Executive.

a. The Adjournment Clause furnishes each House of Congress with the power to ensure the simultaneous presence of the other House so that they can together conduct legislative business.[58] Insofar as the matter concerns solely the interaction of the two Houses, we may assume arguendo that they have some leeway to determine whether a particular practice comports with the Clause. And in any event each House has the ability as a practical matter to respond to, or overlook, an infringement by the other.[59]

At least, in the absence of considerable deference to Congress, however, a string of pro-forma sessions at which no business will be conducted for 20 days cannot be seen as meaningfully compliant with the Adjournment Clause. Indeed, the Senate appears to have concluded as much in December 1876. Senator Henry Anthony pro-

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[58] See Jefferson's Opinion on the Constitutionality of the Residence Bill (July 15, 1790), in 17 *The Papers of Thomas Jefferson* 195-196 (Julian P. Boyd ed., 1965) (explaining that the Adjournment Clause was "necessary therefore to keep [the Houses of Congress] together by restraining their natural right of deciding on separate times and places, and by requiring a concurrence of will").

[59] When the Senate used a unanimous consent resolution to adjourn from a Saturday until a Thursday in 1916, "it was called to the attention of the House membership but nothing further was ever done about it." *Riddick's Senate Procedure* at 15. But see *United States* v. *Munoz-Flores*, 495 U.S. 385, 395-396 (1990) (finding Origination Clause claim justiciable; stating that "[p]rovisions for the separation of powers within the Legislative Branch," like those "concerning relations between the branches," "safeguard liberty").

posed to have the Senate meet every three days "[w]ithout the transaction of any business" so as to permit a nine-day holiday "recess." 5 Cong. Rec. 333 (1876). Even after Senator Anthony agreed to put the proposal in an informal and non-binding manner, Senator Roscoe Conkling objected:

> [H]ow can it be that by an indirection so slight as that now proposed we can circumvent the [Adjournment Clause]? Obviously, the same power which permits an adjournment in that mode for nine days, in that same mode would permit an adjournment for ninety days. * * * I have a very fixed opinion that this is beyond any suggestion of power heretofore made.

Id. at 335; see also *id.* at 336 (Sen. Hamlin) ("If that is not in contravention of the plain meaning and intent of the Constitution, then I do not understand the force of language."). The resolution was altered to avoid Conkling's objection. *Id.* at 336, 337-338.[60]

b. Of course, even if the Court were to defer to the House and Senate's belief that a series of pro-forma sessions may satisfy their obligations to one another not to adjourn without the other's consent, such deference

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[60] Respondent also contends (Cert. Resp. 3, 32) that the Senate has recently used pro-forma sessions to comply with its obligation under Section 2 of the Twentieth Amendment to "begin" its annual "meeting" at noon on January 3 (unless that date has been changed by law). It is not clear whether a pro-forma session is adequate to that purpose, as Congress has long regarded that requirement (and its predecessor in Art. I, § 4, Cl. 2) as being fulfilled even when it fails to attain a quorum on that date. See, *e.g.*, 6 Annals of Cong. 1517 (1796); 8 *id.* at 2189 (1798); 9 *id.* at 2417-2418 (1798). But a pro-forma session with a single member could hardly suffice to satisfy Congress's other obligation under Section 2 of the Twentieth Amendment: to "assemble at least once in every year."

has no proper bearing on the meaning of the Recess Appointments Clause. Even assuming arguendo that the President has no direct interest in whether each House secures the other's consent for an adjournment (notwithstanding his role in the law-making process), he plainly has a direct interest in the balance that Article II strikes between his need to secure the Senate's advice and consent for appointments at certain times, and his unilateral power to make temporary appointments when the Senate is not available.

Thus, even assuming that the pro-forma sessions prevented the Senate from violating its obligation to secure the House's consent to an adjournment, the Senate still entered an order that "no business" be conducted for 20 days and characterized the resulting cessation of business as "the Senate's recess"—a conclusion consistent with the plain meaning of the term "recess." Moreover, throughout that time, the Senate's members were dispersed and unavailable to consult as a body, and messages from the President were not laid before it. Under the century-old test applied by the Executive and the Senate itself, that period was a recess.

c. Respondent's contrary view—under which the Senate may be absent in fact while present only by virtue of a legal fiction—would upset the balance struck in Article II between the Appointments Clause and the "auxiliary method of appointment" that applies when the Senate is unavailable to provide its advice and consent but there are vacancies "which it might be necessary for the public service to fill without delay." *Federalist No. 67*, at 455.

As discussed above, since 2007, the Senate has used pro-forma sessions to string together breaks in business lasting as long as 47 days, see 158 Cong. Rec. at S5955,

and respondent's position provides no stopping point. See *New Vista*, 719 F.3d at 261 (Greenaway, J., dissenting) ("[W]hat if the Senate remained in pro forma sessions while it broke for six to nine months, as was its routine at the time of ratification, hoping that this would prevent the President from making recess appointments?"). The Framers could not have anticipated or desired such a result. Nor is it justified by anything in the first two centuries of practice under the Appointments and Recess Appointments Clauses.

d. The significant separation-of-powers concerns raised by respondent's position are illustrated by this case. If, as respondent urges, the Senate could prevent the President from filling vacancies on the Board while simultaneously being absent to act on nominations, the Board, by virtue of losing its quorum, would have been disabled from carrying out significant portions of its statutory mission, thus preventing the execution of a duly passed Act of Congress and the performance of the functions of an office "established by Law," U.S. Const. Art. II, § 2, Cl. 2. That result would directly undermine the President's duty to "take Care that the Laws be faithfully executed," Art. II, § 3—which necessarily requires the "assistance of subordinates." *Myers*, 272 U.S. at 117.

In contrast, upholding the Board members' appointments will not vitiate the Senate's powers or the ordinary process of advice and consent. The recess appointments were only temporary; the commissions were to "expire at the End of [the Senate's] next Session." Art. II, § 2, Cl. 3. The Senate retained authority to vote on the President's nominees when it returned. More fundamentally, the Senate retains the choice it has always had: to remain "continually in session for the appoint-

ment of officers," *Federalist No. 67*, at 455, thereby removing the constitutional predicate for the President's recess appointment power, or to cease temporarily the conduct of business (and potentially leave the capital) knowing that the President may make temporary appointments during that period. Because the Senate cannot choose to do both at the same time, the Court should reject respondent's request to "disrupt[] the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions." *Morrison* v. *Olson*, 487 U.S. 654, 695 (1988) (internal quotation marks, alterations, and citations omitted).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BETH S. BRINKMANN
Deputy Assistant Attorney General
CURTIS E. GANNON
Assistant to the Solicitor General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
MELISSA N. PATTERSON
BENJAMIN M. SHULTZ
Attorneys

LAFE E. SOLOMON
Acting General Counsel
CELESTE J. MATTINA
Deputy General Counsel
JOHN H. FERGUSON
MARGERY E. LIEBER
Associate General Counsels
LINDA DREEBEN
Deputy Associate General Counsel
National Labor Relations Board

SEPTEMBER 2013

APPENDIX A

APPOINTMENTS CURRENTLY KNOWN TO HAVE BEEN MADE DURING INTRA-SESSION RECESSES OF THE SENATE, BY APPOINTMENT DATE

Intra-session Appointments by Andrew Johnson[1]

Samuel Blatchford, District Judge, S.D.N.Y.	5/3/1867
George Bancroft, Envoy Extraordinary and Minister Plenipotentiary, Prussia[2]	5/14/1867
Andrew J. Baker, Deputy Postmaster, Seymour, Ind.[3]	5/17/1867
John Hay, Secretary of Legation, Austria[4]	5/20/1867
Hattie C. Fay, Deputy Postmaster, Rochester, Minn.[5]	5/21/1867

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[1] Except where indicated, the source for all listed appointments by President Johnson is Henry B. Hogue, Cong. Research Serv., *Memorandum re: Intrasession Recess Appointments* 5 (Apr. 23, 2004) (*Hogue Intrasession*).

[2] Appointment Record of George Bancroft, *Card Record of Appointments Made from 1776 to 1960* (Entry 798), Records Relating to Appointments and Commissions, Records Relating to Various Functions 1764-1979, General Records of the Department of State, Record Group 59 (RG 59), National Archives College Park (NACP).

[3] Appointment Record of Andrew J. Baker, Entry 798, RG 59, NACP.

[4] Appointment Record of John Hay, Entry 798, RG 59, NACP.

[5] Appointment Record of Hattie C. Fay, Entry 798, RG 59, NACP.

John S. Walton, Treasurer of the Branch Mint and Assistant Treasurer of the United States, New Orleans, La.[6]	5/28/1867
William Silvey, Collector of Customs, Newark, N.J.[7]	5/30/1867
Orrin J. Rose, Consul, Taranto[8]	5/30/1867
Alexander Bliss, Secretary of Legation, Prussia[9]	6/10/1867
John Cleghorn, Register of Land Office, Sioux City, Iowa	between 3/30/1867 & 7/3/1867
Frank Cowan, Secretary to the President (patent signing)	between 3/30/1867 & 7/3/1867

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[6] Appointment Record of John S. Walton, Entry 798, RG 59, NACP.

[7] Commission of William Silvey, May 30, 1867, Vol. 35, p. 9, *Commissions Issued To Major Treasury Officers ("Presidential Appointments"), 1791-1909* (Entry 234), Records Relating to Appointments and Commissions, Records of the Division of Appointments, 1791-1945, General Records of the Department of the Treasury, Record Group 56 (RG 56), NACP.

[8] Appointment Record of Orrin J. Rose, Entry 798, RG 59, NACP.

[9] Appointment Record of Alexander Bliss, Entry 798, RG 59, NACP.

Edward S. Davis, Register of Land Office, Austin, Nev.	between 3/30/1867 & 7/3/1867
Stephen S. Fenn, Receiver of Public Moneys, Idaho Territory	between 3/30/1867 & 7/3/1867
David D. Hitchcock, Pension Agent, Ft. Gibson, Cherokee Nation	between 3/30/1867 & 7/3/1867
Richard Hurley, Receiver of Public Moneys, Idaho Territory	between 3/30/1867 & 7/3/1867
William N. Johnson, Register of Land Office, Sacramento, Cal.	between 3/30/1867 & 7/3/1867
James Lutterill, Receiver of Public Moneys, Fair Play, Colorado Territory	between 3/30/1867 & 7/3/1867
Nicholas H. Owings, Register of Land Office, Fair Play, Colorado Territory	between 3/30/1867 & 7/3/1867
Benjamin Thompson, Indian Agent, Dakota Territory	between 3/30/1867 & 7/3/1867
Jefferson J. Works, Receiver of Public Moneys, Austin, Nev.	between 3/30/1867 & 7/3/1867

William G. Wilson, Deputy Postmaster, La Fayette, Ind.[10]	8/8/1867
John S. Walton, Treasurer of the Branch Mint, New Orleans, La.[11]	8/10/1867
William J. Clark, Surveyor of Customs, Middletown, Conn.[12]	8/10/1867
Joseph S. Collins, Deputy Postmaster, Fort Randall, Dakota Territory[13]	8/20/1867
Charles H. Thompson, Deputy Postmaster, Shreveport, La.[14]	8/20/1867
F.J. Sherman, Deputy Postmaster, Chicago, Ill.[15]	8/27/1867
Oscar Minor, Collector of Customs, D. Tex.[16]	8/30/1867

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[10] Commission of William G. Wilson, Aug. 8, 1867, Vol. 4, p. 338, *Temporary Commissions of Deputy Postmasters, 1837-1873* (Entry 792), RG 59, NACP.

[11] Appointment Record of John S. Walton, Entry 798, RG 59, NACP.

[12] Commission of William J. Clark, Aug. 10, 1867, Vol. 35, p. 10, Entry 234, RG 56, NACP.

[13] Commission of Joseph S. Collins, Aug. 20, 1867, Vol. 4, p. 339, Entry 792, RG 59, NACP.

[14] Commission of Charles H. Thompson, Aug. 20, 1867, Vol. 4, p. 340, Entry 792, RG 59, NACP.

[15] Commission of F.J. Sherman, Aug. 27, 1867, Vol. 4, p. 341, Entry 792, RG 59, NACP.

Orrin J. Rose, Consul, Mechlenburg Schwerin[17]	9/25/1867
William Hefner, Deputy Postmaster, Shreveport, La.[18]	9/26/1867
J. Warren Bell, Collector of Customs, Corpus Christi, Tex.[19]	10/1/1867
William P. Gould, Additional Paymaster of Volunteers[20]	10/18/1867
Thomas N. Lee, Deputy Postmaster, Hancock, Mich.[21]	10/22/1867
James Hare, Deputy Postmaster, Hays City, Kan.[22]	7/30/1868
George W. Colby, Collector of Internal Revenue, 2nd Dist. of Ala.[23]	8/6/1868

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[16] Commission of Oscar Minor, Aug. 30, 1867, Vol. 35, p. 11, Entry 234, RG 56, NACP.

[17] Appointment Record of Orrin J. Rose, Entry 798, RG 59, NACP.

[18] Commission of William Hefner, Sept. 26, 1867, Vol. 4, p. 342, Entry 792, RG 59, NACP.

[19] Commission of J. Warren Bell, Oct. 1, 1867, Vol. 35, p. 12, Entry 234, RG 56, NACP.

[20] *Gould* v. *United States*, 19 Ct. Cl. 593, 595 (1884).

[21] Commission of Thomas N. Lee, Oct. 22, 1867, Vol. 4, p. 343, Entry 792, RG 59, NACP.

[22] Commission of James Hare, July 30, 1868, Vol. 4, p. 345, Entry 792, RG 59, NACP.

[23] Commission of George W. Colby, Aug. 6, 1868, Vol. 35, p. 122, Entry 234, RG 56, NACP.

Andrew J. Goss, Collector of Customs, St. Augustine, Fla.[24]	8/12/1868
Solomon Glose, Assessor of Internal Revenue, 8th Dist. of Pa.[25]	8/12/1868
Clara W. Drake, Deputy Postmaster, Westfield, N.Y.[26]	8/18/1868
Isaac W. Webster, Deputy Postmaster, Kenosha, Wis.[27]	8/18/1868
Hiram Ketchum, Jr., Collector of Customs, D. Alaska[28]	8/20/1868
Joseph E. Smith, Collector of Customs, Wiscasset, Me.[29]	8/22/1868
John P. O'Neill, U.S. District Attorney, E.D. Pa.[30]	8/22/1868

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[24] Commission of Andrew J. Goss, Aug. 12, 1868, Vol. 35, p. 15, Entry 234, RG 56, NACP.

[25] Commission of Solomon Glose, Aug. 12, 1868, Vol. 35, p. 138, Entry 234, RG 56, NACP.

[26] Commission of Clara W. Drake, Aug. 18, 1868, Vol. 4, p. 346, Entry 792, RG 59, NACP.

[27] Commission of Isaac W. Webster, Aug. 18, 1868, Vol. 4, p. 347, Entry 792, RG 59, NACP.

[28] Commission of Hiram Ketchum, Jr., Aug. 20, 1868, Vol. 35, p. 15, Entry 234, RG 56, NACP.

[29] Commission of Joseph E. Smith, Aug. 22, 1868, Vol. 35, p. 14, Entry 234, RG 56, NACP.

[30] *Case of the Dist. Att'y of the United States*, 7 F. Cas. 731, 732 (E.D. Pa. 1868) (No. 3924).

Perry Fuller, Collector of Customs, New Orleans, La.[31]	8/26/1868
Lloyd D. Waddell, Assessor of Internal Revenue, 1st Dist. of Ga.[32]	8/26/1868
Otis H. Russell, Collector of Internal Revenue, 4th Dist. of Va.[33]	8/28/1868
Conduce G. Megrue, Assessor of Internal Revenue, 2d Dist. of Ohio[34]	9/2/1868
Rene J. Fougeray, Assessor of Internal Revenue, 4th Dist. of Pa.[35]	9/2/1868
Charles C. Dane, Collector of Internal Revenue, 5th Dist. of Mass.[36]	9/3/1868
Orton Hackett, Deputy Postmaster, Baton Rouge, La.[37]	9/8/1868

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[31] Commission of Perry Fuller, Aug. 26, 1868, Vol. 35, p. 16, Entry 234, RG 56, NACP; see 12 Op. Att'y Gen. 449 (1868).

[32] Commission of Lloyd D. Waddell, Aug. 26, 1868, Vol. 35, p. 123, Entry 234, RG 56, NACP.

[33] Commission of Otis H. Russell, Aug. 28, 1868, Vol. 35, p. 124, Entry 234, RG 56, NACP.

[34] Commission of Conduce G. Megrue, Sept. 2, 1868, Vol. 35, p. 125, Entry 234, RG 56, NACP.

[35] Commission of Rene J. Fougeray, Sept. 2, 1868, Vol. 35, p. 126, Entry 234, RG 56, NACP.

[36] Commission of Charles C. Dane, Sept. 3, 1868, Vol. 35, p. 127, Entry 234, RG 56, NACP.

[37] Commission of Orton Hackett, Sept. 8, 1868, Vol. 4, p. 348, Entry 792, RG 59, NACP.

A.J. Simmons, Collector of Internal Revenue, D. Mont.[38]	9/28/1868
Albert G. Ryan, Collector of Internal Revenue, 1st Dist. of Ark.[39]	9/30/1868
Samuel Babcock, Collector of Internal Revenue, 2d Dist. of Conn.[40]	10/1/1868
William A. Wisong, Collector of Internal Revenue, 3d Dist. of Md.[41]	10/14/1868
John Williams, Collector of Internal Revenue, 2d Dist. of Tenn.[42]	10/16/1868
Thomas A. Burditt, Assessor of Internal Revenue, 1st Dist. of Miss.[43]	10/23/1868
James A. Maryman, Surveyor of Customs, Llewellensburg, Md.[44]	10/24/1868

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[38] Commission of A.J. Simmons, Sept. 28, 1868, Vol. 35, p. 128, Entry 234, RG 56, NACP.

[39] Commission of Albert G. Ryan, Sept. 30, 1868, Vol. 35, p. 129, Entry 234, RG 56, NACP.

[40] Commission of Samuel Babcock, Oct. 1, 1868, Vol. 35, p. 130, Entry 234, RG 56, NACP.

[41] Commission of William A. Wisong, Oct. 14, 1868, Vol. 35, p. 131, Entry 234, RG 56, NACP.

[42] Commission of John Williams, Oct. 16, 1868, Vol. 35, p. 132, Entry 234, RG 56, NACP.

[43] Commission of Thomas A. Burditt, Oct. 23, 1868, Vol. 35, p. 136, Entry 234, RG 56, NACP.

[44] Commission of James A. Maryman, Oct. 24, 1868, Vol. 35, p. 17, Entry 234, RG 56, NACP.

Charles R. Levenwell, 10/29/1868
U.S. Marshal, D.N.J.[45]

Robert K. Byrd, 11/6/1868
Collector of Internal Revenue, 2d Dist. of Tenn.[46]

Intra-session Appointments by Warren G. Harding

Mabel Walker Willebrandt, 8/29/1921
Assistant Attorney General, Dep't of Justice[47]

John W.H. Crim, 8/29/1921
Assistant Attorney General, Dep't of Justice[48]

J.T. Williams, 8/29/1921
U.S. Attorney, N.D. Cal.[49]

Irving Smith, 8/30/1921
Register of Land Office, Seattle, Wash.[50]

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[45] Commission of Charles R. Levenwell, Oct. 29, 1868, Vol. 1, *Temporary Marshals' Commissions, Apr. 20, 1829-Nov. 30, 1887* (Entry 787), RG 59, NACP.

[46] Commission of Robert K. Byrd, Nov. 6, 1868, Vol. 35, p. 135, Entry 234, RG 56, NACP.

[47] *California Woman to be Assistant to Daugherty*, Wash. Times, Aug. 29, 1921, at 1.

[48] *Annual Report of the Attorney General of the United States for the Fiscal Year 1921*, at 93 (1921).

[49] *California Woman to be Assistant to Daugherty*, Wash. Times, Aug. 29, 1921, at 1.

[50] *Hogue Intrasession* 7.

Intra-session Appointment by Calvin Coolidge

John J. Esch, 1/3/1928
Member, Interstate Commerce Commission[51]

Intra-session Appointments by Herbert Hoover

Ralph H. Van Deman, 6/25/1929
Major General, U.S. Army[52]

George C. Shaw, 6/25/1929
Brigadier General, U.S. Army[53]

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[51] *Ibid.*

[52] *Van Deman Raised To Be Maj. General*, Army & Navy Journal, June 29, 1929, at 881 (reporting Van Deman's promotion to fill vacancy created by death of Maj. Gen. Harry Smith); Draft Nomination Submission, Sept. 4, 1929, Box 5, *Nomination & Senate Confirmations Relating To Promotions Of Brigadier Generals And Other General Officers, 1914-51*, Records of the Adjutant General's Office, Record Group 407, NACP (bearing handwritten notations that Van Deman was recess appointed, but that he then retired and was never nominated).

[53] *Van Deman Raised To Be Maj. General*, Army & Navy Journal, June 29, 1929, at 881 (reporting Shaw's promotion to fill vacancy created by Van Deman's promotion); Draft Nomination Submission, Sept. 4, 1929 (handwritten "R" signifying Shaw was recess appointee).

C.B. Denman, Alexander Legge, William F. Schilling, James C. Stone, Charles C. Teague, Carl Williams, and Charles S. Wilson, Members, Federal Farm Board[54]	7/15/1929
Samuel Roy McKelvie, Member, Federal Farm Board[55]	7/30/1929

Intra-session Appointments by Franklin D. Roosevelt[56]

Oliver P. Hopkins, Assistant Director, Bureau of Foreign & Domestic Commerce	7/27/1943
Raymond C. Miller, Assistant Director, Bureau of Foreign & Domestic Commerce	7/27/1943
Amos E. Taylor, Director, Bureau of Foreign & Domestic Commerce	7/27/1943
Dwight D. Eisenhower, Major General, U.S. Army[57]	8/30/1943

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[54] 9 Comp. Gen. 190, 191 (1929); 71 Cong. Rec. 3403 (1929).

[55] *Ibid.*; *M'Kelvie Is Named To Farm Board*, N.Y. Times, July 31, 1929, at 3.

[56] Except where indicated, the source for listed appointments by President Roosevelt is *Hogue Intrasession* 8.

James F. Byrnes, Director, War Mobilization and Reconversion Office	10/3/1944
Richard McElligott, Register, Land Office at Roseburg, Or.	10/24/1944
Brig. Gen. Frank T. Hines, Administrator, Retraining & Reemployment Administration	between 9/21/1944 & 11/14/1944

Intra-session Appointments by Harry Truman[58]

Dean G. Acheson, Under Secretary of State	8/16/1945
Frank McCarthy, Assistant Secretary of State	8/21/1945
Spruille Braden, Assistant Secretary of State	8/25/1945
Robert N. Denham, General Counsel, NLRB	7/31/1947
J. Copeland Gray, Member, NLRB	7/31/1947
Abe Murdock, Member, NLRB	7/31/1947

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[57] *The Public Papers and Addresses of Franklin D. Roosevelt, 1943*, at 370-371 (1950).

[58] Except where indicated, the source for listed appointments by President Truman is *Hogue Intrasession* 9-15.

John T. Jarecki, Collector, Internal Revenue, 1st Dist. of Ill.	8/1/1947
John R. Alison, Assistant Secretary of Commerce	8/4/1947
Charles Oliphant, Assistant General Counsel, Bureau of Internal Revenue	8/6/1947
Roy W. Harper, District Judge, E.D. & W.D. Mo.	8/7/1947
J. Alston Adams, Member, Federal Home Loan Bank Board	8/11/1947
Cyrus S. Ching, Member, Federal Mediation and Conciliation Service	8/11/1947
Nathaniel Dyke, Jr., Member, Federal Home Loan Bank Board	8/11/1947
John H. Fahey, Member, Federal Home Loan Bank Board	8/11/1947
Raymond M. Foley, Administrator, Housing and Home Finance	8/11/1947
Dillon S. Myer, Commissioner, Public Housing Administration	8/11/1947
Franklin D. Richards, Commissioner, Federal Housing Administration	8/11/1947
Theodore B. Werner, U.S. Marshal, S.D.	8/12/1947

Oscar R. Ewing, Federal Security Administrator	8/20/1947
Watson B. Miller, Commissioner, Immigration and Naturalization Service	8/20/1947
John L. Sullivan, Secretary of the Navy[59]	8/22/1947
Kenneth C. Royall, Secretary of the Army[60]	8/22/1947
Lawrence C. Kingsland, Commissioner of Patents	8/23/1947
James Boyd, Director, Bureau of Mines (Interior)	8/26/1947
William H. Draper, Jr., Under Secretary of the Army	8/29/1947
John H. Hilldring, Alternate Representative, U.N. General Assembly[61]	9/15/1947
W. John Kenney, Under Secretary of the Navy[62]	9/19/1947

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[59] Walter H. Waggoner, *Royall Appointed Army Secretary; Sullivan for Navy*, N.Y. Times, Aug. 22, 1947, at 1.

[60] *Ibid.*

[61] 93 Cong. Rec. 11,030 (1947); *Miss Gildersleeve Quits*, N.Y. Times, Sept. 16, 1947, at 10.

[62] Anthony Leviero, *Defense Command Filled as 2 More Take Service Oath*, N.Y. Times, Sept. 19, 1947, at 1; *Kenney Takes Oath of Higher Navy Post*, N.Y. Times, Sept. 20, 1947, at 10.

Paul H. Alling, Ambassador to Pakistan	9/20/1947
Walter J. Donnelly, Envoy/Minister to Venezuela	9/20/1947
Arthur M. Hill, Chairman, National Security Resources Board	9/20/1947
Roscoe H. Hillenkoetter, Director of Central Intelligence	9/20/1947
H. Freeman Matthews, Ambassador to Sweden	9/20/1947
W. Stuart Symington, Secretary of the Air Force	9/20/1947
Thomas P. Thornton, U.S. Attorney, E.D. Mich.	9/22/1947
Gordon Gray, Assistant Secretary of the Army	9/24/1947
Vannevar Bush, Chairman, Research and Development Board	9/25/1947
Thomas J. Hargrave, Chairman, Munitions Board	9/26/1947
John E. Parks, Judge, 1st Circuit, Territory of Hawaii	9/27/1947
Nathaniel P. Davis, Ambassador to Costa Rica	9/30/1947
David R. Heath, Ambassador to Bulgaria	9/30/1947

John T. Kmetz, Assistant Secretary of Labor[63]	9/30/1947
Frank Porter Graham, Representative to the Good Offices Committee of the Security Council of the United Nations on Indonesia[64]	10/1/1947
Arthur S. Barrows, Under Secretary of the Air Force	10/2/1947
Cornelius V. Whitney, Assistant Secretary of the Air Force	10/2/1947
Eugene M. Zuckert, Assistant Secretary of the Air Force	10/2/1947
William Benton, Laurence Duggan, Milton S. Eisenhower, Reuben G. Gustavson, and Helen C. White, Representatives, UNESCO General Conference[65]	10/7/1947

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[63] *Truman Picks Kmetz, Lewis Aide, As Assistant Secretary of Labor*, N.Y. Times, Oct. 1, 1947, at 24.

[64] 93 Cong. Rec. 10,723 (1947); *Educator to Represent U.S. in Indonesian Case*, N.Y. Times, Oct. 2, 1947, at 10.

[65] 93 Cong. Rec. 11,030 (1947); Appointment Records of Laurence Duggan, Reuben G. Gustavson, and Helen C. White, Entry 798, RG 59, NACP.

Detlev W. Bronk, Charles S. Johnson, George D. Stoddard, and Howard E. Wilson, Alternate Representatives, UNESCO General Conference[66]	10/7/1947
James H. Keeley, Jr., Envoy/Minister to Syria	10/8/1947
5885 officers in the Regular Army and Regular Air Force, comprising 294 Majors, 928 Captains, 4165 1st Lieutenants, and 498 2nd Lieutenants[67]	10/10/1947
Paul Aiken, Second Assistant Postmaster General	10/14/1947
J. Klahr Huddle, Ambassador to Burma	10/17/1947
George R. Humrickhouse, U.S. Attorney, E.D. Va.	10/22/1947
Joe E. Daniels, Assistant Commissioner of Patents (Commerce)	10/30/1947
Sylvester J. Ryan, District Judge, S.D.N.Y.	11/1/1947

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[66] 93 Cong. Rec. 11,030 (1947); Appointment Records of Charles S. Johnson, George D. Stoddard, and Howard E. Wilson, Entry 798, RG 59, NACP.

[67] *New Permanent Career Officers Selected for Army and Air Force*, Army & Navy Journal, Oct. 11, 1947, at 146 (listing 5885 "officers and former officers of the National Guard, Officers Reserve Corps and Army of the United States" who received recess "commissions in the Regular Army and Regular Air Force").

Louise Leonard Wright, Alternate Representative, UNESCO General Conference[68]	11/4/1947
Alan G. Kirk, Representative to the Balkan Committee[69]	11/5/1947
General Carl Spaatz, Chief of Staff of the Air Force	11/5/1947
216 officers in the Regular Army and Regular Air Force[70]	11/14/1947
John J. Fitzpatrick, Collector, Internal Revenue, D. Conn.	6/22/1948
George B. Gillin, Superintendent of the Mint, San Francisco	6/22/1948
Byron B. Harlan, Judge, Tax Court of the United States	6/22/1948
Roy W. Harper, District Judge, W.D. Mo.	6/22/1948
Marion J. Harron, Judge, Tax Court of the United States	6/22/1948

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[68] Appointment Record of Louise Leonard Wright, Entry 798, RG 59, NACP.

[69] 93 Cong. Rec. 10,723 (1947); *Kirk to View Balkans*, N.Y. Times, Nov. 6, 1947, at 2.

[70] *Officer Procurement Program*, Army & Navy Journal, Nov. 22, 1947, at 300 (reporting "[t]he final integration of 216 officers into the Regular Army and Regular Air Force through recess appointments approved 14 Nov. by President Truman").

Samuel H. Kaufman, District Judge, S.D.N.Y.	6/22/1948
William Marvel, U.S. Attorney, Del.	6/22/1948
Paul P. Rao, Judge, Court of Customs	6/22/1948
Gilroy Roberts, Engraver of the Mint, Philadelphia	6/22/1948
Edward A. Tamm, District Judge, D.D.C.	6/22/1948
Milton S. Eisenhower, Waldo G. Leland, and Anne O'Hare McCormick, Representatives, UNESCO General Conference[71]	6/24/1948
Frank Capra, William H. Hastie, Kathleen N. Lardie, W. Albert Noyes, Jr., and George F. Zook, Alternate Representatives, UNESCO General Conference[72]	6/24/1948

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[71] 94 Cong. Rec. 9509 (1948); Appointment Records of Waldo G. Leland and Anne O'Hare McCormick, Entry 798, RG 59, NACP.

[72] 94 Cong. Rec. 9509 (1948); Appointment Records of Frank Capra, Kathleen N. Lardie, and George F. Zook, Entry 798, RG 59, NACP.

Albert J. Loveland, Under Secretary of Agriculture	6/26/1948
David J. Coddaire, Member, U.S. Maritime Administration	6/29/1948
James G. McDonald, U.S. Special Rep. to Provisional Government of Israel	6/29/1948
A. Miles Pratt, Collector of Customs, Dist. 20, New Orleans	6/29/1948
Myron M. Cowen, Ambassador to Australia[73]	7/1/1948
Carl H. Fleckenstine, U.S. Marshal, W.D. Pa.	7/2/1948
Alfred J. Plowden, Jr., U.S. Marshal, E.D.S.C.	7/2/1948
Lester Luther, U.S. Attorney, Kan.	7/2/1948
Kehoe C. Shannon, U.S. Marshal, W.D. Tex.	7/2/1948
Stanton Griffis, Ambassador to Egypt	7/6/1948
Waldemar J. Gallman, Ambassador to Poland	7/6/1948

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[73] *Cowen, GOP New Deal Enemy, Made Ambassador By Truman*, Wash. Post, July 2, 1948, at 5.

B. Harvie Branscomb, Member, U.S. Advisory Commission on Educational Exchange[74]	7/12/1948
Edward H. Foley, Under Secretary of the Treasury	7/13/1948
John S. Graham, Assistant Secretary of the Treasury	7/13/1948
Thomas C. Buchanan, Member, Federal Power Commission	7/14/1948
Loy W. Henderson, Ambassador to India	7/14/1948
Maj. Gen. Lewis B. Hershey, Director, Selective Service System	7/17/1948
W. Averell Harriman, Representative, Economic Commission for Europe, Economic and Social Council of the United Nations[75]	between 6/20/1948 & 7/26/1948
Karl T. Compton, Harold W. Dodds, Martin P. McGuire, and Mark Starr, Members, U.S. Advisory Commission on Educational Exchange[76]	between 6/20/1948 & 7/26/1948

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[74] Appointment Record of B. Harvie Branscomb, Entry 798, RG 59, NACP.

[75] 94 Cong. Rec. 9509 (1948).

[76] *Ibid.*

William E. Willett, Member of the Board of Directors, Reconstruction Finance Corporation[77]	between 6/20/1948 & 7/26/1948
Warren R. Austin, John Foster Dulles, Anna Eleanor Roosevelt, and Phillip C. Jessup, Representatives, U.N. General Assembly[78]	8/11/1948
Benjamin V. Cohen, Ray Atherton, Willard L. Thorp, Ernest A. Gross, and Francis B. Sayre, Alternate Representatives, U.N. General Assembly[79]	8/11/1948
Henry F. Grady, Chief, American Aid Mission to Greece[80]	8/11/1948
David N. Edelstein, Assistant Attorney General for Customs[81]	8/11/1948
Maurice Tobin, Secretary of Labor[82]	8/13/1948

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[77] *Id.* at 9510.

[78] *U.N. Assembly Group Renamed By Truman*, N.Y. Times, Aug. 12, 1948, at 3.

[79] *Ibid.*

[80] *Ibid.*

[81] *Ibid.*

897 officers in the Medical Corps, Dental Corps, and Medical Service Corps of the Regular Army, comprising 12 Colonels, 307 Lieutenant Colonels, 378 Majors, and 200 Captains[83]	between 8/7/1948 & 8/14/1948
John H. Houston, Member, NLRB	8/20/1948
Frank C. Squire, Member, Railroad Retirement Board[84]	8/26/1948
David E. Henderson, District Judge, W.D.N.C.	9/1/1948
George Kenneth Holland, Representative, UNESCO General Conference[85]	9/14/1948
Albert J. Loveland, Ralph S. Trigg, Glenn R. Harris, and L. Carl Fry, Members, Commodity Credit Corporation[86]	10/1/1948

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[82] *Tobin Takes Oath As Secretary of Labor*, N.Y. Times, Aug. 14, 1948, at 5.

[83] *Medical Department Promotions*, Army & Navy Journal, Aug. 14, 1948, at 1377 (reporting "recess appointments" in light of President Truman's approval of "[p]ermanent promotion for 897 Regular Army Medical Officers").

[84] *Squire Renamed to Rail Board*, N.Y. Times, Aug. 27, 1948, at 28.

[85] Appointment Record of George Kenneth Holland, Entry 798, RG 59, NACP.

[86] 95 Cong. Rec. 15,007 (1949).

H. Van Zile Hyde, Representative, Executive Board, World Health Organization[87]	10/18/1948
Ralph Wright, Assistant Secretary of Labor[88]	10/31/1948
Joseph Rosier, Alternate Representative, UNESCO General Conference[89]	11/13/1948
Joseph B. Keenan, Representative, U.N. Conciliation Commission for Palestine[90]	12/29/1948
James G. MacKey, U.S. Attorney, Guam	9/26/1950
Chuck Mau, 2nd Judge, 1st Circuit, Circuit Court of Hawaii	9/26/1950
Paul D. Shriver, District Judge, D. Guam	9/26/1950
William M. Byrne Sr., District Judge, S.D. Cal.	9/27/1950
Oliver J. Carter, District Judge, S.D. Cal.	9/27/1950

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[87] *Hyde Gets Health Post*, N.Y. Times, Oct. 19, 1948, at 19.

[88] *Veteran Unionist Named To Labor Department Post*, N.Y. Times, Nov. 1, 1948, at 16.

[89] Appointment Record of Joseph Rosier, Entry 798, RG 59, NACP.

[90] Appointment Record of Joseph B. Keenan, Entry 798, RG 59, NACP.

George J. Bott, General Counsel, NLRB	9/28/1950
H. Tucker Gratz, Collector of Customs, Dist. 32, Hawaii	9/28/1950
V. Allan Hubbard, Collector of Customs, Dist. 45, St. Louis	9/28/1950
Albert H. Kleffman, Collector of Customs, Dist. 35, Minneapolis	9/28/1950
Richard M. Bissell, Jr., Deputy Administrator, Economic Cooperation Administration	9/29/1950
William C. Foster, Administrator, Economic Cooperation Administration	9/29/1950
Robert A. Lovett, Deputy Secretary of Defense	9/29/1950
Walter E. Cosgriff, Member, Reconstruction Finance Corporation	9/30/1950
W. Elmer Harber, Member, Reconstruction Finance Corporation	9/30/1950
C. Edward Rowe, Member, Reconstruction Finance Corporation	9/30/1950
Stephen J. Spingarn, Member, Federal Trade Commission	10/20/1950
Walter M. Bastian, District Judge, D.D.C.	10/23/1950

Peter C. Brown, Member, Subversive Activities Control Board	10/23/1950
David J. Coddaire, Member, Subversive Activities Control Board	10/23/1950
Chalres M. LaFollette, Member, Subversive Activities Control Board	10/23/1950
Kathryn McHale, Member, Subversive Activities Control Board	10/23/1950
Seth W. Richardson, Member, Subversive Activities Control Board	10/23/1950
Andrew J. Howard, Jr., Judge, Municipal Court, D.C.	11/2/1950
Anna M. Rosenberg, Assistant Secretary of Defense	11/11/1950
Henry G. Bennett, Administrator, Technical Corporation (State)	11/15/1950
Howard H. Tewksbury, Ambassador to Paraguay	11/18/1950
Robert T. Creasey, Assistant Secretary of Labor	between 9/23/1950 & 11/27/1950
John A. Remon, Member, D.C. Redevelopment Land Agency	between 9/23/1950 & 11/27/1950

John D. Small, Chairman, Munitions Board	between 9/23/1950 & 11/27/1950

Intra-session Appointments by Dwight D. Eisenhower[91]

Carl J. Stephens, Member, Commodity Credit Corporation	between 7/3/1960 & 8/8/1960
Albert J. Hayes, Member, National Security Training Commission	8/28/1954
G. Joseph Minetti, Member, Federal Maritime Board	8/28/1954
Lamar R. Cecil, District Judge, E.D. Tex.	8/31/1954
Phil M. McNagny, Jr., U.S. Attorney, N.D. Ind.	8/31/1954
Philip A. Ray, General Counsel, Commerce Dep't	8/31/1954
Norman Armour, Ambassador to Guatemala	9/15/1954
Jack K. McFall, Ambassador to Finland	9/15/1954
John E. Peurifoy, Ambassador to Thailand	9/15/1954

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[91] The source for all listed appointments by President Eisenhower is *Hogue Intrasession* 17-19.

Edward T. Wailes, Ambassador to Union of South Africa	9/15/1954
Walter M. Bastian, Judge, U.S. Court of Appeals for the D.C. Circuit	9/20/1954
Russell R. Bell, U.S. Marshal, S.D. W. Va.	9/20/1954
Carter L. Burgess, Assistant Secretary of Defense	9/20/1954
Albert Pratt, Assistant Secretary of the Navy	9/20/1954
Irl E. Thomas, U.S. Marshal, N.D. W. Va.	9/20/1954
John A. Hall, Director, Locomotive Inspection, Interstate Commerce Commission	9/25/1954
Robert C. Hill, Ambassador to El Salvador	9/25/1954
George C. McConnaughey, Member, Federal Communications Commission	9/25/1954
John L. Tappin, Ambassador to Libya	9/25/1954
Robert F. Woodward, Ambassador to Costa Rica	9/25/1954
Hawthorne Arey, Member, Board of Directors, Export-Import Bank	9/27/1954

Glen E. Edgerton, President, Export-Import Bank	9/27/1954
Brig. Gen. Charles G. Holle, Member, Mississippi River Commission	9/27/1954
Brig. Gen. William E. Potter, Member, Mississippi River Commission	9/27/1954
Lynn U. Stambaugh, First Vice President, Export-Import Bank	9/27/1954
Willard F. Libby, Member, Atomic Energy Commission	10/1/1954
Leon P. Miller, U.S. Attorney, Virgin Is.	10/1/1954
John R. Morris, U.S. Attorney, N.D. W. Va.	10/1/1954
M. Frank Reid, U.S. Marshal, W.D.S.C.	10/1/1954
Vance Brand, Member, Board of Directors, Export-Import Bank	10/11/1954
Gerald A. Drew, Ambassador to Bolivia	10/11/1954
David S. Smith, Assistant Secretary of the Air Force	10/19/1954
Carlton G. Beall, U.S. Marshal, D.C.	10/22/1954
John Von Neumann, Member, Atomic Energy Commission	10/23/1954

Byron D. Woodside, Member, Securities and Exchange Commission	7/9/1960
Robert A. Bicks, Assistant Attorney General, Dep't of Justice	7/12/1960
Charles H. King, Member, Federal Communications Commission	7/12/1960
Paul A. Sweeney, Member, Federal Power Commission	7/12/1960
Harold R. Tyler, Jr., Assistant Attorney General, Dep't of Justice	7/12/1960
Henry S. Villard, Ambassador to Mali	7/18/1960
Christian M. Ravndal, Ambassador to Czechoslovakia	7/21/1960
Tom Killefer, First Vice President, Export-Import Bank	7/22/1960
Carl J. Stephens, Member, Commodity Credit Corporation	between 7/3/1960 & 8/8/1960

Intra-session Appointments by Richard M. Nixon[92]

Andrew E. Gibson, Assistant Secretary of Commerce	10/21/1970
C. Langhorne Washburn, Assistant Secretary of Commerce	10/21/1970

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[92] Except where indicated, the source for listed appointments by President Nixon is *Hogue Intrasession* 21.

Hubert B. Pair, Judge, D.C. Ct. App.[93]	10/24/1970
Gerard D. Reilly, Judge, D.C. Ct. App.[94]	10/24/1970
J. Walter Yeagley, Judge, D.C. Ct. App.[95]	10/24/1970
Robert C. Mardian, Assistant Attorney General, Dep't of Justice	11/7/1970
Philip A. Loomis, Jr., Member, Securities and Exchange Commission	8/13/1971

Intra-session Appointments by Jimmy Carter[96]

Neil Goldschmidt, Secretary of Transportation	8/10/1979
John C. Sawhill, Chairman, U.S. Synthetic Fuels Corporation	10/5/1980

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[93] Statement Announcing the Recess Appointment of Three Judges to the District of Columbia Court of Appeals, Pub. Papers 939 (Oct. 24, 1970).

[94] *Ibid.*

[95] *Ibid.*

[96] Except where indicated, the source for listed appointments by President Carter is *Hogue Intrasession* 22.

Catherine B. Cleary, John D. DeButts, Lane Kirkland, and Frank Savage, Members, Board of Directors, U.S. Synthetic Fuels Corporation[97]	10/5/1980
Laird F. Harris, Assistant Director, Community Services Administration	10/17/1980
Harold L. Thomas, Assistant Director, Community Services Administration	10/17/1980
Alex P. Mercure, Under Secretary of Agriculture	10/23/1980
John Truesdale, Member, NLRB	10/23/1980
Hannah Atkins, Donald F. McHenry, William J. vanden Heuvel, Representatives to the U.N. General Assembly[98]	between 10/2/1980 & 11/12/1980

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[97] Synthetic Fuels Corporation, 3 Pub. Papers 2074 (Oct. 5, 1980).

[98] Digest of Other White House Announcements, 3 Pub. Papers 2069 (Sept. 30, 1980); 126 Cong. Rec. 29,392 (1980).

Nathan Landow, H. Carl McCall, Barbara Newsom, and Richard W. Petree, Alternate Representatives to the U.N. General Assembly[99]	between 10/2/1980 & 11/12/1980

Intra-session Appointments by Ronald Reagan[100]

Terry Chambers, Alternate Federal Co-Chairman of eight Regional Commissions: Coastal Plains, Four Corners, New England, Old West, Ozarks, Pacific Northwest, Southwest Border, and Upper Great Lakes	8/7/1981
John R. Van de Water, Member, NLRB	8/13/1981
Robert P. Hunter, Member, NLRB	8/13/1981
Richard M. Murphy, Ambassador to Saudi Arabia	8/19/1981
Darrell Trent, Member, Board of Directors, Amtrak	9/8/1981
John M. Fowler, Member, Board of Directors, Amtrak	9/8/1981

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[99] *Ibid.*

[100] The source for all listed appointments by President Reagan is Henry B. Hogue et al., Cong. Research Serv., *Memorandum re: The* Noel Canning *Decision and Recess Appointments Made from 1981-2013*, at 5-7 (Feb. 4, 2013) (*Hogue 1981-2013*).

Lee L. Verstandig, Member, Board of Directors, Amtrak	9/8/1981
Arthur E. Teele, Member, Board of Directors, Amtrak	9/8/1981
Charles Swinburn, Member, Board of Directors, Amtrak	9/8/1981
Mark S. Knouse, Member, Board of Directors, Amtrak	9/8/1981
Jeane J. Kirkpatrick, Representative, U.N. General Assembly Session	9/8/1981
Kenneth L. Adelman, Representative, U.N. General Assembly Session	9/8/1981
Andy Ireland, Representative, U.N. General Assembly Session	9/8/1981
Benjamin A. Gilman, Representative, U.N. General Assembly Session	9/8/1981
John Sherman Cooper, Representative, U.N. General Assembly Session	9/8/1981
Charles M. Lichenstein, Alternate Representative, U.N. General Assembly Session	9/8/1981
Jose S. Sorzano, Alternate Representative, U.N. General Assembly Session	9/8/1981
William Courtney Sherman, Alternate Representative, U.N. General Assembly Session	9/8/1981

Bruce Caputo, Alternate Representative, U.N. General Assembly Session	9/8/1981
George Christopher, Alternate Representative, U.N. General Assembly Session	9/8/1981
Richard V. Backley, Member, Federal Mine Safety and Health Review Commission	9/7/1982
L. Clair Nelson, Member, Federal Mine Safety and Health Review Commission	10/6/1982
Martin S. Feldstein, Member, Council of Economic Advisors	10/14/1982
Orville G. Bentley, Assistant Secretary – Science and Education, Dep't of Agriculture	10/14/1982
William Gene Lesher, Member, Board of Directors, National Consumer Cooperative Bank	10/22/1982
Caroline H. Hume, Member, National Museum Services Board	10/22/1982
Frank J. Donatelli, Member, Board of Directors, Legal Services Corporation	10/23/1982
Daniel M. Rathburn, Member, Board of Directors, Legal Services Corporation	10/23/1982

Manuel H. Johnson Jr., Assistant Secretary – Economic Policy, Dep't of the Treasury	11/2/1982
Edward A. Knapp, Director, National Science Foundation	11/2/1982
Donald P. Hodel, Secretary of Energy	11/5/1982
Martha O. Hesse, Assistant Secretary – Management and Administration, Dep't of Energy	11/10/1982
Mastin Gentry White, Judge, U.S. Claims Court	11/10/1982
James Daniel Phillips, Alternate Representative, UNESCO General Conference	11/19/1982
Jean Broward Shelvin Gerard, Representative, UNESCO General Conference	11/19/1982
Milton M. Masson, Member, Board of Directors, Legal Services Corporation	1/21/1983
Robert E. McCarthy, Member, Board of Directors, Legal Services Corporation	1/21/1983
Donald Eugene Santarelli, Member, Board of Directors, Legal Services Corporation	1/21/1983

E. Donald Shapiro, Member, Board of Directors, Legal Services Corporation	1/21/1983
Linda Chavez Gersten, Staff Director, Commission on Civil Rights	8/16/1983
J. William Middendorf II, Member, Board of Directors, Inter-American Foundation	9/6/1983
Langhorne A. Motley, Member, Board of Directors, Inter-American Foundation	9/6/1983
William Lee Hanley Jr., Member, Board of Directors, Corporation for Public Broadcasting	9/12/1983
Erich Bloch, Director, National Science Foundation	7/2/1984
Robert N. Broadbent, Assistant Secretary of the Interior	7/2/1984
Melvin A. Ensley, Member, Federal Farm Credit Board, Farm Credit Administration	7/2/1984
Marianne M. Hall, Commissioner, Copyright Royalty Tribunal	7/2/1984
Dodie Truman Livingston, Chief, Children's Bureau, Dep't of Health and Human Services	7/2/1984

Martha R. Seger, Member, Board of Directors, Federal Reserve System	7/2/1984
William Barclay Allen, Member, National Council on the Humanities	7/2/1984
Mary Josephine Conrad Cresimore, Member, National Council on the Humanities	7/2/1984
Leon Richard Kass, Member, National Council on the Humanities	7/2/1984
Kathleen S. Kilpatrick, Member, National Council on the Humanities	7/2/1984
Robert Laxalt, Member, National Council on the Humanities	7/2/1984
James B. Schall, Member, National Council on the Humanities	7/2/1984
Helen Marie Taylor, Member, National Council on the Humanities	7/2/1984
Donald I. MacDonald, Administrator, Alcohol, Drug Abuse and Mental Health Administration	7/3/1984
Lando W. Zech Jr., Member, Nuclear Regulatory Commission	7/3/1984
Carol Gene Dawson, Commissioner, Consumer Products Safety Commission	7/5/1984

Robert A. Rowland, Assistant Secretary – Occupational Safety and Health, Dep't of Labor	7/20/1984
John A. Bohn, First Vice President, Export-Import Bank	1/21/1985
Richard H. Hughes, Member, Board of Directors, Export-Import Bank	1/21/1985
Vance L. Clark, Administrator, Farmers Home Administration	8/8/1985
Thomas John Josefiak, Member, Federal Election Commission	8/8/1985
Raymond D. Lett, Assistant Secretary of Agriculture	8/8/1985
Hugh Montgomery, Alternate Representative for Special Political Affairs, United Nations	8/8/1985
Herbert Stuart Okun, Deputy Representative to the United Nations	8/8/1985
Robert E. Rader Jr., Member, Occupational Safety and Health Review Commission	8/8/1985
John R. Wall, Member, Occupational Safety and Health Review Commission	8/8/1985
Robert Bigger Oakley, Ambassador to Pakistan	8/26/1988

John E. Higgins Jr., 8/29/1988
Member, NLRB

Wilford W. Johansen, 8/29/1988
Member, NLRB

Intra-session Appointments by George H.W. Bush[101]

Alan Greenspan, 8/10/1991
Chair, Board of Governors, Federal Reserve System

Mary F. Wieseman, 8/21/1991
Special Counsel, Office of Special Counsel

Ford B. Ford, 9/4/1991
Member, Federal Mine Safety and Health Review Commission

Norman D. Shumway, 9/5/1991
Board Member, Legal Services Corporation

Albert V. Casey, 1/9/1992
CEO, Resolution Trust Corporation

Daniel F. Evans Jr., 1/9/1992
Director (designated Chair), Federal Housing Finance Board

Lawrence U. Costiglio, 1/9/1992
Director, Federal Housing Finance Board

William C. Perkins, 1/9/1992
Director, Federal Housing Finance Board

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[101] The source for all listed appointments by President George H.W. Bush is *Hogue 1981-2013*, at 13-14.

Marilyn R. Seymann, Director, Federal Housing Finance Board	1/9/1992
Howard H. Dana Jr., Board Member, Legal Services Corporation	1/10/1992
J. Blakeley Hall, Board Member, Legal Services Corporation	1/10/1992
William L. Kirk Jr., Board Member, Legal Services Corporation	1/10/1992
Jo Betts Love, Board Member, Legal Services Corporation	1/10/1992
Guy V. Molinari, Board Member, Legal Services Corporation	1/10/1992
Penny L. Pullen, Board Member, Legal Services Corporation	1/10/1992
Thomas D. Rath, Board Member, Legal Services Corporation	1/10/1992
Basile J. Uddo, Board Member, Legal Services Corporation	1/10/1992
George W. Wittgraf, Board Member, Legal Services Corporation	1/10/1992
Jeanine E. Wolbeck, Board Member, Legal Services Corporation	1/10/1992
Edward J. Damich, Commissioner, Copyright Royalty Tribunal	9/3/1992
Bruce D. Goodman, Commissioner, Copyright Royalty Tribunal	9/3/1992

James H. Grossman, Chair, Foreign Claims Settlement Commission	9/3/1992
David J. Ryder, Director of the Mint	9/3/1992
Steven Muller, Member, National Security Education Board	1/6/1993
S. William Pattis, Member, National Security Education Board	1/6/1993
John P. Roche, Member, National Security Education Board	1/6/1993
Richard F. Stolz, Member, National Security Education Board	1/6/1993
Thomas L. Ashley, Governor, Board of Governors, U.S. Postal System	1/8/1993
Marion G. Chambers, Member, Board of Trustees, Institute of American Indian and Alaska Native Culture and Arts Development	1/8/1993
James A. Courter, Member, Defense Base Closure and Realignment Commission (BRAC)	1/8/1993
Peter B. Bowman, Member, BRAC	1/8/1993
Beverly B. Byron, Member, BRAC	1/8/1993

Rebecca G. Cox, Member, BRAC	1/8/1993
Hansford T. Johnson, Member, BRAC	1/8/1993
Arthur Levitt Jr., Member, BRAC	1/8/1993
Harry C. McPherson Jr., Member, BRAC	1/8/1993
Robert D. Stuart Jr., Member, BRAC	1/8/1993

Intra-session Appointments by William J. Clinton[102]

William C. Brooks, Member, Social Security Advisory Board	1/19/1996
Eileen B. Claussen, Assistant Secretary – Oceans and International Environmental and Scientific Affairs, Dep't of State	1/19/1996
Robert F. Drinan, Member, Civil Liberties Public Education Fund	1/19/1996
Peter B. Edelman, Assistant Secretary – Planning and Evaluation, Dep't of Health and Human Services	1/19/1996
Sarah M. Fox, Member, NLRB	1/19/1996

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[102] The source for all listed appointments by President Clinton is *Hogue 1981-2013*, at 16-18.

Leo M. Goto, Member, Civil Liberties Public Education Fund	1/19/1996
Susan Hayase, Member, Civil Liberties Public Education Fund	1/19/1996
Charles A. Hunnicutt, Assistant Secretary – Aviation and International Affairs, Dep't of Transportation	1/19/1996
Elsa H. Kudo, Member, Civil Liberties Public Education Fund	1/19/1996
Yeiichi Kuwayama, Member, Civil Liberties Public Education Fund	1/19/1996
Harlan Mathews, Member, Social Security Advisory Board	1/19/1996
Dale Minami, Member, Civil Liberties Public Education Fund	1/19/1996
Peggy A. Nagae, Member, Civil Liberties Public Education Fund	1/19/1996
Don T. Nakanishi, Member, Civil Liberties Public Education Fund	1/19/1996
Gerald M. Shea, Member, Social Security Advisory Board	1/19/1996
Gerald N. Tirozzi, Assistant Secretary – Elementary and Secondary Education, Dep't of Education	1/19/1996
Robert C. Brown, Member, Metropolitan Washington Airport Authority	4/12/1996

Daniel Guttman, Member, Occupational Safety and Health Review Commission	4/12/1996
Elizabeth K. Julian, Assistant Secretary – Fair Housing, Dep't of Housing and Urban Development	4/12/1996
Lowell L. Junkins, Member, Federal Agricultural Mortgage Corporation	4/12/1996
Martin A. Kamarck, President (designated Chair), Export-Import Bank	4/12/1996
Michael Kantor, Secretary of Commerce	4/12/1996
Yolanda T. Wheat, Member, National Credit Union Administration	4/12/1996
Johnny H. Hayes, Member, Tennessee Valley Authority	5/31/1996
Wyche Fowler Jr., Ambassador to Saudi Arabia	8/10/1996
Heidi H. Schulman, Member, Corporation for Public Broadcasting	8/20/1996
John E. Higgins, Member, NLRB	8/30/1996
Kevin L. Thurm, Deputy Secretary of Health and Human Services	8/30/1996

Mary L. Jordan, Member, Federal Mine Safety and Health Review Commission	8/31/1996
James B. King, Director, Office of Personnel Management	4/6/1997
Tadd Johnson, Chairperson, National Indian Gaming Commission	8/29/1997
David G. Carpenter, Assistant Secretary – Director of Diplomatic Security and Office of Foreign Missions, Dep't of State	8/12/1998
William L. Swing, Ambassador to Congo	8/12/1998
James C. Hormel, Ambassador to Luxembourg	6/4/1999
Mark R. Tucker, U.S. Marshal, E.D.N.C.	9/2/1999
Sue Bailey, Administrator, National Highway Traffic Safety Administration	8/3/2000
Arthur C. Campbell, Assistant Secretary – Economic Development, Dep't of Commerce	8/3/2000

James A. Daley, Ambassador to Barbados, Antigua and Barbuda, Dominica, Grenada, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines	8/3/2000
Robin C. Duke, Ambassador to Norway	8/3/2000
Sally Katzen, Deputy Director, Office of Management and Budget	8/3/2000
Bill Lann Lee, Assistant Attorney General, Civil Rights Division, Dep't of Justice	8/3/2000
Franz S. Leichter, Member, Federal Housing Finance Board	8/3/2000
W. Michael McCabe, Deputy Administrator, Environmental Protection Agency	8/3/2000
Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, Dep't of Justice	8/3/2000
David W. Ogden, Assistant Attorney General, Civil Division, Dep't of Justice	8/3/2000
Francisco J. Sanchez, Assistant Secretary - Aviation and International Affairs, Dep't of Transportation	8/3/2000

Carl Spielvogel, Ambassador to the Slovak Republic	8/3/2000
Ella Wong-Rusinko, Alternate Federal Co-Chair, Appalachian Regional Commission	8/3/2000
George T. Frampton Jr., Member (designated Chair), Council on Environmental Quality	8/4/2000
John D. Holum, Under Secretary – Arms Control and International Security Affairs, Dep't of State	8/4/2000
Robert S. LaRussa, Under Secretary – International Trade, Dep't of Commerce	8/4/2000
James C. Riley, Commissioner, Federal Mine Safety and Health Review Commission	8/31/2000
Sarah L. Wilson, Judge, U.S. Court of Federal Claims	1/19/2001

Intra-session Appointments by George W. Bush[103]

Peter J. Hurtgen, Member (designated Chair), NLRB	8/31/2001
Emil H. Frankel, Assistant Secretary – Transportation Policy, Dep't of Transportation	3/29/2002

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[103] The source for all listed appointments by President George W. Bush is *Hogue 1981-2013*, at 21-26.

Gerald Reynolds, Assistant Secretary – Civil Rights, Dep't of Education	3/29/2002
Dennis L. Schornack, Commissioner, International Joint Commission, United States and Canada	3/29/2002
Jeffrey Shane, Associate Deputy Secretary of Transportation	3/29/2002
Michael E. Toner, Member, Federal Election Commission	3/29/2002
Albert Casey, Governor, U.S. Postal Service	8/6/2002
Thomas C. Dorr, Board Member, Commodity Credit Corporation	8/6/2002
Thomas C. Dorr, Under Secretary – Rural Development, Dep't of Agriculture	8/6/2002
Cheryl F. Halpern, Board Member, Corporation for Public Broadcasting	8/6/2002
Tony Hammond, Commissioner, Postal Rate Commission	8/6/2002
Susanne T. Marshall, Chair, Merit Systems Protection Board	8/6/2002
W. Scott Railton, Member (designated Chair), Occupational Safety and Health Review Commission	8/6/2002

Lillian R. BeVier, Board Member, Legal Services Corporation	4/22/2003
Naomi C. Earp, Member (designated Vice Chair), Equal Employment Opportunity Commission	4/22/2003
Peter Eide, General Counsel, Federal Labor Relations Authority	4/22/2003
April H. Foley, Board Member, Export-Import Bank	4/22/2003
Thomas A. Fuentes, Board Member, Legal Services Corporation	4/22/2003
R. Bruce Matthews, Member, Defense Nuclear Facilities Safety Board	4/22/2003
Neil McPhie, Member (designated Vice Chair), Merit Systems Protection Board	4/22/2003
James C. Miller III, Governor, U.S. Postal Service	4/22/2003
William A. Schambra, Board Member, Corporation for National and Community Service	4/22/2003
Stanley C. Suboleski, Member, Federal Mine Safety and Health Review Commission	4/22/2003

Donna N. Williams, Board Member, Corporation for National and Community Service	4/22/2003
A. Paul Anderson, Member, Federal Maritime Commission	8/22/2003
Ephraim Batambuze, Board Member, African Development Foundation	8/22/2003
David W. Fleming, Member (public), Board of Trustees of the James Madison Memorial Fellowship Foundation	8/22/2003
Jose A. Fourquet, Board Member (government representative), Inter-American Foundation	8/22/2003
Adolfo A. Franco, Board Member (government representative), Inter-American Foundation	8/22/2003
Jay P. Greene, Member (academic), Board of Trustees of the James Madison Memorial Fellowship Foundation	8/22/2003
Walter H. Kansteiner, Board Member, African Development Foundation	8/22/2003
Charlotte A. Lane, Member, U.S. International Trade Commission	8/22/2003

Patrick L. McCrory, Member, Board of Trustees of the Harry S. Truman Scholarship Foundation	8/22/2003
Roger F. Noriega, Board Member (government representative), Inter-American Foundation	8/22/2003
Daniel Pearson, Member, U.S. International Trade Commission	8/22/2003
John R. Petrocik, Member (academic), Board of Trustees of the James Madison Memorial Fellowship Foundation	8/22/2003
Daniel Pipes, Board Member, U.S. Institute of Peace	8/22/2003
Juanita A. Vasquez-Gardner, Member, Board of Trustees of the Harry S. Truman Scholarship Foundation	8/22/2003
John P. Woodley Jr., Assistant Secretary – Civil Works, Dep't of the Army	8/22/2003
William H. Pryor, Judge, U.S. Court of Appeals for the Eleventh Circuit	2/20/2004
Linda M. Combs, Assistant Secretary – Budget and Programs, Dep't of Transportation	4/16/2004
Linda M. Conlin, Board Member, Export-Import Bank	4/16/2004

Eugene Hickock, Deputy Secretary of Education	4/16/2004
Edward R. McPherson, Under Secretary of Education	4/18/2004
Romolo A. Bernardi, Deputy Secretary of Housing and Urban Development	5/28/2004
Edward Brehm, Board Member (designated Chair), African Development Foundation	5/28/2004
Charles Johnson, CFO, Environmental Protection Agency	5/28/2004
Ann R. Klee, Assistant Administrator (General Counsel), Environmental Protection Agency	5/28/2004
Adam M. Lindemann, Member, Advisory Board for Cuba Broadcasting	5/28/2004
Cathy M. MacFarlane, Assistant Secretary – Public Affairs, Dep't of Housing and Urban Development	5/28/2004
Dennis C. Shea, Assistant Secretary – Policy Development and Research, Dep't of Housing and Urban Development	5/28/2004
Kiron K. Skinner, Member, National Security Education Board	5/28/2004
Deborah A. Spagnoli, Commissioner, U.S. Parole Commission	5/28/2004

Kirk Van Tine, Deputy Secretary of Transportation	5/28/2004
Juanita A. Vasquez-Gardner, Member, Board of Trustees of the Harry S. Truman Scholarship Foundation	5/28/2004
Sue Ellen Wooldridge, Solicitor, Dep't of the Interior	5/28/2004
Michael D. Gallagher, Assistant Secretary – Communications and Information, Dep't of Commerce	7/2/2004
Floyd Hall, Member, Reform Board (Amtrak)	7/2/2004
Theodore W. Kassinger, Deputy Secretary of Commerce	7/2/2004
Jack E. McGregor, Member – Advisory Board, Saint Lawrence Seaway Development Corporation	7/2/2004
Carin M. Barth, CFO, Dep't of Housing and Urban Development	8/2/2004
Jonathan W. Dudas, Under Secretary – Intellectual Property and Director of the U.S. Patent and Trademark Office, Dep't of Commerce	8/2/2004
Albert A. Frink Jr., Assistant Secretary – Manufacturing and Services, Dep't of Commerce	8/2/2004
Susan J. Grant, CFO, Dep't of Energy	8/2/2004

Ricardo H. Hinojosa, Chair, U.S. Sentencing Commission	8/2/2004
Nadine Hogan, Board Member (private representative) (designated Vice Chair), Inter-American Foundation	8/2/2004
Stephen L. Johnson, Deputy Administrator, Environmental Protection Agency	8/2/2004
Paul Jones, Member, Internal Revenue Service Oversight Board	8/2/2004
James R. Kunder, Assistant Administrator – Bureau for Asia and the Near East, U.S. Agency for International Development	8/2/2004
John D. Rood, Ambassador to the Commonwealth of Bahamas	8/2/2004
Enrique J. Sosa, Member, Reform Board (Amtrak)	8/2/2004
Charles G. Untermeyer, Ambassador to the State of Qatar	8/2/2004
Jack Vaughn, Board Member (private representative), Inter-American Foundation	8/2/2004
Gary L. Visscher, Member, Chemical Safety and Hazard Investigation Board	8/2/2004

Richard K. Wagner, Member, Advisory Board, National Institute for Literacy	8/2/2004
Scott K. Walker, Member – Advisory Board, Saint Lawrence Seaway Development Corporation	8/2/2004
Roger W. Wallace, Board Member (private representative) (designated Chair), Inter-American Foundation	8/2/2004
Aldona Wos, Ambasador to the Republic of Estonia	8/2/2004
Deborah P. Majoras, Commissioner (designated Chair), Federal Trade Commission	8/16/2004
Jon D. Leibowitz, Commissioner, Federal Trade Commission	9/1/2004
Carolyn L. Gallagher, Governor, U.S. Postal Service	11/3/2004
Louis J. Giuliano, Governor, U.S. Postal Service	11/3/2004
Adolfo A. Franco, Board Member (government representative), Inter-American Foundation	1/19/2005
Gregory B. Jaczko, Member, Nuclear Regulatory Commission	1/19/2005
Peter B. Lyons, Member, Nuclear Regulatory Commission	1/19/2005

Roger F. Noriega, Board Member (government representative), Inter-American Foundation	1/19/2005
James H. Bilbray, Member, Defense Base Closure and Realignment Commission (BRAC)	4/1/2005
Philip Coyle, Member, BRAC	4/1/2005
Harold W. Gehman Jr., Member, BRAC	4/1/2005
James V. Hansen, Member, BRAC	4/1/2005
James T. Hill, Member, BRAC	4/1/2005
Lloyd W. Newton, Member, BRAC	4/1/2005
Anthony J. Principi, Member (designated Chair), BRAC	4/1/2005
Samuel K. Skinner, Member, BRAC	4/1/2005
Sue Ellen Turner, Member, BRAC	4/1/2005
Michael W. Wynne, Under Secretary – Acquisition, Technology and Logistics, Dep't of Defense	4/1/2005

John R. Bolton, Representative of the United States to the United Nations, Dep't of State; Representative of the United States in the U.N. Security Council, Dep't of State; Representative of the United States to Sessions of the U.N. General Assembly, Dep't of State	8/1/2005
Peter C. W. Flory, Assistant Secretary – International Security Policy, Dep't of Defense	8/2/2005
Eric S. Edelman, Under Secretary – Policy, Dep't of Defense	8/9/2005
Alice S. Fisher, Assistant Attorney General, Criminal Division, Dep't of Justice	8/31/2005
Peter Schaumber, Member, NLRB	8/31/2005
Gordon England, Deputy Secretary of Defense	1/4/2006
Stephen Goldsmith, Board Member, Corporation for National and Community Service	1/4/2006
Floyd Hall, Member, Reform Board (Amtrak)	1/4/2006
Tracy A. Henke, Executive Director, Office of State and Local Government Coordination and Preparedness, Dep't of Homeland Security	1/4/2006

Nadine Hogan, Board Member (private representative) (designated Vice Chair), Inter-American Foundation	1/4/2006
Peter N. Kirsanow, Member, NLRB	1/4/2006
Robert D. Lenhard, Member, Federal Election Commission	1/4/2006
Ronald E. Meisburg, General Counsel, NLRB	1/4/2006
Julie L. Myers, Assistant Secretary – Bureau of Immigration and Customs Enforcement, Dep't of Homeland Security	1/4/2006
Benjamin A. Powell, General Counsel, Office of the Director of National Intelligence	1/4/2006
Arthur F. Rosenfeld, Director, Federal Mediation and Conciliation Service	1/4/2006
Ellen R. Sauerbrey, Assistant Secretary – Population, Refugees, and Migration, Dep't of State	1/4/2006
Dorrance Smith, Assistant Secretary – Public Affairs, Dep't of Defense	1/4/2006
Enrique J. Sosa, Member, Reform Board (Amtrak)	1/4/2006

Hans von Spakovsky, Member, Federal Election Commission	1/4/2006
Roger W. Wallace, Member (private representative) (designated Chair), Inter-American Foundation	1/4/2006
Steven T. Walther, Member, Federal Election Commission	1/4/2006
John Gardner, Governor, U.S. Postal Service	1/5/2006
Steven K. Mullins, U.S. Attorney, D.S.D.	1/9/2006
C. Boyden Gray, Ambassador to the European Union	1/17/2006
Dennis P. Walsh, Member, NLRB	1/17/2006
John L. Palmer, Member, Board of Trustees of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund; Board of Trustees of the Supplementary Medical Insurance Trust Fund; Board of Trustees of the Federal Hospital Insurance Trust Fund	4/19/2006
Thomas R. Saving, Member of the same three Boards of Trustees	4/19/2006
Bertha K. Madras, Deputy Director, Demand Reduction, Office of National Drug Control Policy	4/19/2006

James F.X. O'Gara, Deputy Director, Supply Reduction, Office of National Drug Control Policy	4/19/2006
Paul DeCamp, Administrator, Wage and Hour Division, Dep't of Labor	8/31/2006
Michael F. Duffy, Member, Federal Mine Safety and Health Review Commission	8/31/2006
Daniel Meron, General Counsel, Dep't of Health and Human Services	8/31/2006
Richard E. Stickler, Assistant Secretary – Mine Safety and Health, Dep't of Labor	10/19/2006
Jeffrey R. Brown, Member, Social Security Advisory Board	10/19/2006
Andrew G. Biggs, Deputy Commissioner, Social Security Administration	4/4/2007
Susan E. Dudley, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget	4/4/2007
Sam Fox, Ambassador to Belgium	4/4/2007
Carol W. Pope, Member, Federal Labor Relations Authority	4/4/2007

Intra-session Appointments by Barack Obama[104]

Jeffrey A. Goldstein, Under Secretary – Domestic Finance, Dep't of the Treasury	3/27/2010
Michael F. Mundaca, Assistant Secretary – Tax Policy, Dep't of the Treasury	3/27/2010
Eric L. Hirschhorn, Under Secretary – Export Administration, Dep't of Commerce	3/27/2010
Michael W. Punke, Deputy U.S. Trade Representative – Geneva, Office of the U.S. Trade Representative	3/27/2010
Francisco J. Sanchez, Under Secretary – International Trade, Dep't of Commerce	3/27/2010
Islam A. Siddiqui, Chief Agricultural Negotiator, Office of the U.S. Trade Representative	3/27/2010
Alan D. Bersin, Commissioner of U.S. Customs and Border Protection, Dep't of Homeland Security	3/27/2010
Jill L. Thompson, Member, Farm Credit Administration	3/27/2010

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[104] The source for all listed appointments by President Obama is *Hogue 1981-2013*, at 27-28.

Rafael Borras, Under Secretary – Management, Dep't of Homeland Security	3/27/2010
Craig Becker, Member, NLRB	3/27/2010
Mark G. Pearce, Member, NLRB	3/27/2010
Jacqueline A. Berrien, Member (designated Chair), Equal Employment Opportunity Commission (EEOC)	3/27/2010
Chai R. Feldblum, Member, EEOC	3/27/2010
Victoria A. Lipnic, Member, EEOC	3/27/2010
P. David Lopez, General Counsel, EEOC	3/27/2010
Donald M. Berwick, Administrator of the Centers for Medicare and Medicaid Services, Dep't of Health and Human Services	7/7/2010
Philip E. Coyle III, Associate Director for National Security and International Affairs, Office of Science and Technology Policy	7/7/2010
Joshua Gotbaum, Director, Pension Benefit Guaranty Corporation	7/7/2010
Mari C. Aponte, Chief of Mission, El Salvador, Dep't of State	8/19/2010

Elisabeth A. Hagen, Under Secretary – Food Safety, Dep't of Agriculture	8/19/2010
Winslow L. Sargeant, Chief Counsel for Advocacy, Small Business Administration	8/19/2010
Richard Sorian, Assistant Secretary – Public Affairs, Dep't of Health and Human Services	8/19/2010
Richard Cordray, Director, Consumer Financial Protection Bureau	1/4/2012
Sharon Block, Member, NLRB	1/4/2012
Terence F. Flynn, Member, NLRB	1/4/2012
Richard Griffin Jr., Member, NLRB	1/4/2012

APPENDIX B

ILLUSTRATIVE RECESS APPOINTMENTS MADE TO FILL VACANCIES THAT PRE-EXISTED THE RECESSES DURING WHICH THEY WERE MADE[1]

Appointee & Office	*App't Date*	*Vice*
Appointments by George Washington		
Robert C. Scot, Engraver of the Mint[2]	11/23/1793	new position, created 4/2/1792
William Clarke, District Attorney, D. Ky.[3]	10/13/1796	vacant since 12/1792, last declined by 10/1794
Appointments by Thomas Jefferson		
Walter Jones, Jr., District Attorney, D. Potomac[4]	3/31/1801	new position, created 2/13/1801

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[1] This list presents only an illustrative sample of known recess appointments to vacancies that pre-existed the recesses during which those appointments were made. It is not intended to be comprehensive.

[2] Act of Apr. 2, 1792, ch. 16, § 1, 1 Stat. 246; 27 *The Papers of Thomas Jefferson* 191-192 (John Catanzariti ed., 1997); S. Exec. Journal, 3d Cong., 1st Sess. 142-143 (1793).

[3] U.S. Dep't of State, *Calendar of the Miscellaneous Letters Received By The Department of State* 456 (1897); S. Exec. Journal, 4th Cong., 2d Sess. 217 (1796); Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky 1789-1816*, at 70-73 (1978).

George Dent, U.S. Marshal, D. Potomac[5]	4/4/1801	new position, created 2/13/1801
William McMillan, District Attorney, D. Ohio[6]	6/26/1801	new position, created 2/13/1801
James Tindlaye, U.S. Marshal, D. Ohio[7]	6/26/1801	new position, created 2/13/1801

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[4] Act of Feb. 13, 1801, ch. 4, §§ 21, 37, 2 Stat. 96-97, 99-100; Appointment Record of Walter Jones, Jr., *Card Record of Appointments Made from 1776 to 1960* (Entry 798), Records Relating to Appointments and Commissions, Records Relating To Various Functions 1764-1979, General Records of the Department of State, Record Group 59 (RG 59), National Archives College Park (NACP).

[5] Act of Feb. 13, 1801, ch. 4, §§ 21, 36, 2 Stat. 96-97, 99; Letter from Levi Lincoln to Thomas Jefferson (Apr. 9, 1801), in 33 *Papers of Thomas Jefferson* 558 (Barbara B. Oberg ed., 2006) (noting Dent's acceptance of the Marshal position); U.S. Marshals Service, *State-by-State Chronological Listing of United States Marshals: Washington, D.C.* 2, available from www.usmarshals.gov/readingroom/us_marshals (noting Dent's April 4, 1801, recess appointment).

[6] Act of Feb. 13, 1801, ch. 4, §§ 4, 37, 2 Stat. 89-90, 99; S. Exec. Journal, 7th Cong., 1st Sess. 400-401 (1802); List of U.S. Attorneys, Entry for William McMillan, Vol. 2, p. 109, *Lists of Miscellaneous Federal Officers, 1789-1912* (Entry 800), RG 59, NACP.

[7] Act of Feb. 13, 1801, ch. 4, §§ 4, 36, 2 Stat. 89-90, 99; S. Exec. Journal, 7th Cong., 1st Sess. 400-401 (1802); U.S. Marshals Service, *State-by-State Chronological Listing of United States Marshals: Ohio* 2 (noting Tindlaye's June 26, 1801, recess appointment).

Appointments by James Madison

Theodore Gaillard, District Judge, D. La.[8]	4/18/1813	Dominic Hall, resigned 2/22/1813
Roger Skinner, District Attorney, N.D.N.Y.[9]	3/21/1815	new position, created 3/3/1815
John W. Livingston, U.S. Marshal, N.D.N.Y[10]	6/19/1815	new position, created 3/3/1815
Solomon Sibley, U.S. Attorney, Michigan Territory[11]	8/21/1815	new position, created 2/27/1813
Thomas Rowland, U.S. Marshal, Michigan Territory[12]	8/21/1815	new position, created 2/27/1813

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[8] Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 400-401 (2005).

[9] Act of Mar. 3, 1815, ch. 95, 3 Stat. 235, S. Journal, 13th Cong., 3d Sess. 689-690 (1815) (reflecting statute's effectiveness before Senate's adjournment); S. Exec. Journal, 14th Cong., 1st Sess. 19 (1816) (noting recess appointment); Appointment Record of Roger Skinner, Entry 798, RG 59, NACP.

[10] Act of Mar. 3, 1815, ch. 95, 3 Stat. 235, S. Journal, 13th Cong., 3d Sess. 689-690 (1815); U.S. Marshals Service, *State-by-State Chronological Listing of United States Marshals: New York* 9.

[11] Act of Feb. 27, 1813, ch. 35, 2 Stat. 806; S. Exec. Journal, 14th Cong., 1st Sess. 19 (1816) (noting recess appointment); List of U.S. Attorneys, Entry for Solomon Sibley, Vol. 2, p. 113, Entry 800, RG59, NACP.

Appointment by James Monroe

Richard W. Habersham, District Attorney, D. Ga.[13]	3/29/1819	William Davies, received commission as district judge 1/14/1819

Appointment by John Quincy Adams

Amos Binney, Navy Agent, Port of Boston[14]	3/22/1825	himself, term expired on 2/15/1825

Appointment by Martin Van Buren

Denny McCobb, Collector of Customs and Inspector of the Revenue, Waldoboro, Me.[15]	between 3/10/1837 & 9/4/1837	himself, term expired on 3/3/1837

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[12] *Ibid.*; U.S. Marshals Service, *State-by-State Chronological Listing of United States Marshals: Michigan* 2.

[13] S. Exec. Journal, 16th Cong., 1st Sess. 185-186 (1819); Federal Judicial Center, *Biographical Directory of Federal Judges*, available from www.fjc.gov/public/home.nsf/hisj (*FJC Biographical Directory*), Entry for William Davies; Appointment Record of Richard W. Habersham, Entry 798, RG59, NACP.

[14] 2 Op. Att'y Gen. 525, 530 (1832).

[15] S. Exec. Journal, 24th Cong., 2d Sess. 615 (1837) (noting expiration date of prior commission); S. Exec. Journal, 25th Cong., 1st Sess. 28 (1837) (noting new recess commission).

Appointment by John Tyler

Dabney Smith Carr, Minister resident at Constantinople[16]	10/6/1843	David Porter, died 3/3/1843

Appointment by James K. Polk

James H. Cocke, U.S. Marshal, D. Tex.[17]	3/6/1847	John M. Allen, died 2/1847

Appointment by Zachary Taylor

Thomas Moses Foote, Charge D'Affaires, New Grenada[18]	5/24/1849	Benjamin A. Bidlack, died 2/6/1849

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[16] 5 *American Biography: A New Cyclopedia* 29 (1919) (noting Porter's death on March 3, 1843, in Pera, Turkey); Cong. Globe, 27th Cong., 3d Sess. 394 (1843) (noting Senate's adjournment between 10 p.m. on March 3 and 2:30 a.m. on March 4, in Washington); S. Exec. Journal, 28th Cong., 1st Sess. 195 (1843); 7 *The Works of James Buchanan* 62 n.2 (John Bassett Moore ed., 1909) (noting Carr's appointment date).

[17] *Died*, Tex. Presbyterian (Victoria, Tex.), Mar. 13, 1847, at 3 (Allen's death), http://texashistory.unt.edu/ark:/67531/metapth80390/m1/3; S. Exec. Journal, 30th Cong., 1st Sess. 249-250 (1847); Commission of James H. Cocke, Mar. 6, 1847, Vol. 1, p. 89, *Temporary Marshals' Commissions (Apr. 20, 1829-Nov. 30, 1887)* (Entry 787), RG 59, NACP.

[18] Office of the Historian, U.S. Dep't of State, *Benjamin A. Bidlack (1804-1849)*, http://history.state.gov/departmenthistory/people/bidlack-benjamin-a; Office of the Historian, U.S. Dep't of State, *Thomas Moses Foote (1808-1858)*, http:// history.state.gov/departmenthistory/people/foote-thomas-moses.

Appointment by Millard Fillmore

Alfred Wheeler, U.S. Attorney, S.D. Cal.[19]	8/22/1851	James McHall Jones, received commission as district judge 12/26/1850

Appointments by James Buchanan

Richard Elward, Deputy Postmaster, Natchez, Miss.[20]	3/25/1857	himself, recess appointment expired 3/3/1857
Daniel C. Brown, Deputy Postmaster, Janesville, Wis.[21]	4/2/1857	Elisha H. Strong, term expired 3/6/1857

Appointments by Abraham Lincoln

William E. Phelps, Consul, St. Petersburg, Russia[22]	10/14/1862	John D. Arnold, resigned 6/16/1862

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[19] List of U.S. Attorneys, Entry for Alfred Wheeler, Vol. 2, p. 141, Entry 800, RG59, NACP; S. Exec. Journal, 32d Cong., 1st Sess. 342 (1851); *Official Confirmations*, N.Y. Daily Trib., Dec. 30, 1850, at 7; *FJC Biographical Directory*, Entry for James McHall Jones.

[20] S. Exec. Journal, 35th Cong., 1st Sess. 386 (1858); Appointment Record of Richard Elward, Entry 798, RG59, NACP.

[21] S. Exec. Journal, 35th Cong., 1st Sess. 436 (1858); Appointment Record of Daniel C. Brown, Entry 798, RG59, NACP.

[22] List of Consuls to St. Petersburg, Entries for John D. Arnold and William E. Phelps, Vol. 1, p. 97, *List of Consuls and Commercial*

David Davis, Associate Justice, U.S. Supreme Court[23]	10/17/1862	John Archibald Campbell, resigned 4/30/1861
John C. Underwood, District Judge, E.D. Va.[24]	3/27/1863	James D. Halyburton, resigned 4/24/1861
Edward Henry Durell District Judge, E.D. La.[25]	5/20/1863	Theodore H. McCaleb, resigned 1/28/1861

Appointments by Andrew Johnson

George W. Brooks, District Judge, Albemarle, Cape Fear, and Pamptico Districts of N.C.[26]	8/19/1865	Asa Biggs, resigned 4/23/1861

Agents, 1797-1909 (Entry 803), RG 59, NACP; S. Exec. Journal, 37th Cong., 3d Sess. 26 (1862).

[23] *FJC Biographical Directory*, Entries for David Davis and John Archibald Campbell.

[24] *FJC Biographical Directory*, Entries for John Curtiss Underwood and James Dandridge Halyburton.

[25] *FJC Biographical Directory*, Entries for Edward Henry Durell and Theodore Howard McCaleb.

[26] *FJC Biographical Directory*, Entries for George Washington Brooks and Asa Biggs.

Hiram Ketchum, Jr., Collector of Customs, D. Alaska[27]	8/20/1868	new position, created 7/27/1868

Appointments by Ulysses S. Grant

Benjamin Bristow, Solicitor General of the United States[28]	10/11/1870	new position, created 7/1/1870
John McKinney, District Judge, S.D. Fla.[29]	11/8/1870	Thomas J. Boynton, resigned 1/1/1870
Wilhelm Finkler, Consul, Ghent, Belgium[30]	10/1/1874	William Brisbane, resigned 10/18/1873

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[27] Act of July 27, 1868, ch. 273, § 2, 15 Stat. 240; S. Journal, 40th Cong., 2d Sess. 782 (1868) (reflecting statute's effectiveness before Senate's adjournment); Commission of Hiram Ketchum, Jr., Aug. 20, 1868, Vol. 35, p. 15, *Commissions Issued To Major Treasury Officers ("Presidential Appointments"), 1791-1909* (Entry 234), Records Relating to Appointments and Commissions, Records of the Division of Appointments, 1791-1945, General Records of the Department of the Treasury, Record Group 56 (RG 56), NACP.

[28] Act of June 22, 1870, ch. 150, §§ 2, 19, 16 Stat. 162, 165; 79 U.S. (12 Wall.) iii (1872).

[29] *FJC Biographical Directory*, Entries for John McKinney and Thomas Jefferson Boynton.

[30] List of Consuls to Ghent, Entries for William Brisbane and Wilhelm Finkler, Vol. 1, p. 192, Entry 803, RG 59, NACP; S. Exec. Journal, 43d Cong., 2d Sess. 396 (1874); *Consular Suspensions and Patent Promotions*, Nashville Union & American, Oct. 3, 1874, at 1.

Appointments by Rutherford B. Hayes

John F. Hartranft, Collector of Customs, Port of Philadelphia[31]	6/17/1880	A.P. Tutton, term expired 5/31/1880
John S. Bigby, U.S. Attorney, D. Ga.[32]	7/6/1880	Henry P. Farrow, term expired 4/19/1880

Appointment by James A. Garfield

George M. Duskin, U.S. Attorney, S.D. Ala.[33]	6/2/1881	himself, term expired 3/16/1881

Appointment by Chester A. Arthur

Max Polachek, Consul, Ghent, Belgium[34]	10/23/1883	Thomas Wilson, reassigned 4/30/1882

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[31] 16 Op. Att'y Gen. 522, 523 (1880).

[32] *In re Farrow*, 3 F. 112, 112-113 (C.C.N.D. Ga. 1880); Entry for John S. Bigby, *List of U.S. District Attorneys, 1798-1887* (Entry 809), RG 59, NACP.

[33] S. Exec. Journal, 47th Cong., 1st Sess. 213 (1881); Commission of George M. Duskin, June 2, 1881, Vol. 2, p. 27, *Temporary Attorneys' Commissions, 1829-1887* (Entry 789), RG 59, NACP.

[34] List of Consuls to Ghent, Entries for Thomas Wilson and Max Polachek, Vol. 2, p. 34, Entry 803, RG 59, NACP.

Appointments by Grover Cleveland

James C. Matthews, Recorder of Deeds, D.C.[35]	8/9/1886	Frederick Douglass, resigned 3/1/1886
Frederick Fitz Gerald, Consul, Cognac, France[36]	11/5/1894	John P. Beecher, resigned 6/1894

Appointments by Benjamin Harrison

James H. Beatty, District Judge, D. Idaho[37]	3/7/1891	new position, created 7/3/1890
Thomas E. Olsgard, Register of the Land Office, Minot, N.D.[38]	3/9/1891	new position, created 9/26/1890

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[35] 4 *The Life and Writings of Frederick Douglass* 119 (Philip Sheldon Foner ed., 1955); *The Senate Gives Reasons*, N.Y. Times, Feb. 8, 1887, at 1; 17 Cong. Rec. 2221 (1886).

[36] List of Consuls to Cognac, Entries for John P. Beecher and Frederick Fitz Gerald, Vol. 2, p. 103, Entry 803, RG 59, NACP; U.S. Dep't of State, *Register of the Department of State* 57 (Oct. 15, 1912).

[37] Act of July 3, 1890, ch. 656, § 16, 26 Stat. 217; S. Exec. Journal, 52d Cong., 1st Sess. 6 (1891); *FJC Biographical Directory*, Entry for James Helmick Beatty.

[38] Act of Sept. 26, 1890, ch. 946, § 3, 26 Stat. 485; S. Exec. Journal, 52d Cong., 1st Sess. 12 (1891).

Appointments by William McKinley

Daniel Mayer, Consul, Buenos Aires, Argentina[39]	11/3/1897	Edward L. Baker, died 7/8/1897
Frederick H. Wines, Assistant Director of the Census[40]	3/6/1899	new position, created 3/3/1899
George Gray, Judge, U.S. Court of Appeals for the Third Circuit[41]	3/29/1899	new position, created 2/23/1899
John C. Ingersoll, Consul, Cartagena, Colombia[42]	6/11/1900	Rafael Madrigal, resigned 2/23/1900

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[39] S. Exec. Journal, 55th Cong., 2d Sess. 264 (1897); List of Consuls to Buenos Aires, Entries for Edward L. Baker and Daniel Mayer, Vol. 2, p. 34, Entry 803, RG 59, NACP.

[40] Act of Mar. 3, 1899, ch. 419, § 2, 30 Stat. 1014; S. Exec. Journal, 56th Cong., 1st Sess. 3 (1899); 32 Cong. Rec. 2874 (1899) (reflecting statute's effectiveness before Senate's adjournment).

[41] Act of Feb. 23, 1899, ch. 186, 30 Stat. 846; S. Exec. Journal, 56th Cong., 1st Sess. 206 (1899); *FJC Biographical Directory*, Entry for George Gray.

[42] S. Exec. Journal, 56th Cong., 2d Sess. 563 (1900); List of Consuls to Carthagena [*sic*], Entries for John C. Ingersoll and Rafael Madrigal, Vol. 2, p. 84, Entry 803, RG 59, NACP.

Appointments by Theodore Roosevelt

William Dulany Hunter, Consul, Nice, France[43]	3/30/1907	Harold S. Van Buren, died 2/12/1907
Oscar R. Hundley, District Judge, N.D. Ala.[44]	4/7/1907	new position, created 2/25/1907

Appointments by William Howard Taft

John M. Cheney, District Judge, S.D. Fla.[45]	8/26/1912	James W. Locke, resigned 7/4/1912
Clinton W. Howard, District Judge, W.D. Wash.[46]	8/26/1912	Cornelius H. Hanford, resigned 8/5/1912

Appointments by Woodrow Wilson

William S. Benson Chief of Naval Operations[47]	5/11/1915	new position, created 3/3/1915

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[43] S. Exec. Journal, 60th Cong., 1st Sess. 9 (1907); List of Consuls to Nice, Entries for Harold S. Van Buren and William Dulany Hunter, Vol. 2, p. 110, Entry 803, RG 59, NACP.

[44] Act of Feb. 25, 1907, ch. 1198, 34 Stat. 931; *FJC Biographical Directory*, Entry for Oscar Richard Hundley.

[45] *FJC Biographical Directory*, Entries for John Moses Cheney and James William Locke; 48 Cong. Rec. 9763 (1912).

[46] *FJC Biographical Directory*, Entries for Clinton Woodbury Howard and Cornelius Holgate Hanford.

Samuel Alschuler, Judge, U.S. Court of Appeals for the Seventh Circuit[48]	8/16/1915	Peter S. Grosscup, resigned 10/23/1911

Appointments by Warren G. Harding

Claude Zeth Luse, District Judge, W.D. Wis.[49]	4/1/1921	Arthur Loomis Sanborn, died 10/18/1920
William Eli Baker, District Judge, N.D. W. Va.[50]	4/4/1921	Alston Gordon Dayton, died 7/30/1920

Appointments by Calvin Coolidge

Johnson Jay Hayes, District Judge, M.D.N.C.[51]	4/6/1927	new position, created 3/2/1927

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[47] Act of Mar. 3, 1915, ch. 83, 38 Stat. 929; 52 Cong. Rec. 5509 (reflecting adjournment at midnight on March 4); 22 Comp. Treas. 530, 531 (1916).

[48] *FJC Biographical Directory,* Entries for Samuel Alschuler and Peter Stenger Grosscup.

[49] *FJC Biographical Directory,* Entries for Claude Zeth Luse and Arthur Loomis Sanborn.

[50] *FJC Biographical Directory,* Entries for William Eli Baker and Alston Gordon Dayton.

[51] Act of Mar. 2, 1927, ch. 276, 44 Stat. 1340; *FJC Biographical Directory,* Entry for Johnson Jay Hayes.

Simon Louis Adler, District Judge, W.D.N.Y.[52]	5/19/1927	new position, created 3/3/1927

Appointments by Herbert Hoover

C.B. Denman, Member, Fed. Farm Bd.[53]	7/15/1929	new position, created 6/15/1929
Alexander Legge, Member, Fed. Farm Bd.[54]	7/15/1929	new position, created 6/15/1929
William F. Schilling, Member, Fed. Farm Bd.[55]	7/15/1929	new position, created 6/15/1929
James C. Stone, Member, Fed. Farm Bd.[56]	7/15/1929	new position, created 6/15/1929
Charles C. Teague, Member, Fed. Farm Bd.[57]	7/15/1929	new position, created 6/15/1929
Carl Williams, Member, Fed. Farm Bd.[58]	7/15/1929	new position, created 6/15/1929
Charles S. Wilson, Member, Fed. Farm Bd.[59]	7/15/1929	new position, created 6/15/1929

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[52] Act of Mar. 3, 1927, ch. 332, 44 Stat. 1370; *FJC Biographical Directory*, Entry for Simon Louis Adler.

[53] Act of June 15, 1929, Ch. 24, § 2, 46 Stat. 11; 9 Comp. Gen. 190, 191 (1929); 71 Cong. Rec. 3403 (1929).

[54] *Ibid.*

[55] *Ibid.*

[56] *Ibid.*

[57] *Ibid.*

[58] *Ibid.*

Samuel Roy McKelvie, Member, Fed. Farm Bd.[60]	7/30/1929	new position, created 6/15/1929
Ben H. Fuller, Commandant of the Marine Corps[61]	8/8/1930	Wendell C. Neville, died 7/8/1930

Appointments by Franklin D. Roosevelt

Philip Leo Sullivan, District Judge, N.D. Ill.[62]	11/8/1933	George E.Q. Johnson, recess appointment expired 3/3/1933
Charles Edison, Secretary of the Navy[63]	12/30/1939	Claude A. Swanson, died 7/7/1939

Appointments by Harry Truman

Edward Allen Tamm, District Judge, D.D.C.[64]	6/22/1948	James McPherson Proctor, appointed as circuit judge 3/5/1948

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[59] *Ibid.*

[60] *Ibid.*; *M'Kelvie Is Named To Farm Board*, N.Y. Times, July 31, 1929, at 3.

[61] *Gen. Neville Dead; Leader of Marines*, N.Y. Times, July 9, 1930, at 17; *MacArthur Named Chief of Army Staff*, N.Y. Times, Aug. 6, 1930, at 1.

[62] *FJC Biographical Directory*, Entries for Philip Leo Sullivan and George E.Q. Johnson.

[63] *Edison Appointed Naval Secretary By The President*, N.Y. Times, Dec. 31, 1939, at 1.

Albert J. Loveland, Under Secretary of Agriculture[65]	6/26/1948	Norris E. Dodd, resigned 6/7/1948
Maurice Tobin, Secretary of Labor[66]	8/13/1948	Lewis B. Schwellenbach, died 6/10/1948

Appointments by Dwight D. Eisenhower

Elmer J. Schnackenberg, Judge, U.S. Court of Appeals for the Seventh Circuit[67]	11/17/1953	Otto Kerner Sr., died 12/13/1952
John M. Cashin, District Judge, S.D.N.Y.[68]	8/17/1955	Samuel H. Kaufman, assumed senior status 7/31/1955

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[64] *FJC Biographical Directory*, Entries for Edward Allen Tamm and James McPherson Proctor; 28 Comp. Gen. 30, 30 (1948).

[65] *In Washington Yesterday*, N.Y. Times, June 8, 1948, at 18; *Two Agriculture Posts Filled*, N.Y. Times, June 27, 1948, at 29.

[66] *Lewis Schwellenbach Dies at 53*, N.Y. Times, June 11, 1948, at 1; *Tobin Takes Oath As Secretary of Labor*, N.Y. Times, Aug. 14, 1948; 94 Cong. Rec. 10,187 (1948).

[67] *FJC Biographical Directory*, Entries for Elmer Jacob Schnackenberg and Otto Kerner Sr.

[68] *FJC Biographical Directory*, Entries for John M. Cashin and Samuel Hamilton Kaufman; *United States* v. *Allocco*, 305 F.2d 704, 705 (2d Cir. 1962).

Herold C. Hunt, Under Secretary of Health, Education, and Welfare[69]	9/2/1955	Nelson A. Rockefeller, resigned 12/11/1954
Mansfield D. Sprague, General Counsel, Dep't of Defense[70]	10/4/1955	Wilbur M. Brucker, became Secretary of the Army 7/21/1955
J. Lee Rankin, Solicitor General of the United States[71]	8/14/1956	Simon E. Sobeloff, became circuit judge 7/19/1956
Appointments by John F. Kennedy		
Thurgood Marshall, Judge, U.S. Court of Appeals for the Second Circuit[72]	10/5/1961	new position, created 5/19/1961

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[69] Office of Public Information, Office of the Secretary, U.S. Dep't of Health, Education, and Welfare, *"A Common Thread of Service": An Historical Guide to HEW* 43 (1970), http://babel.hathitrust.org/cgi/pt?id=mdp.39015078355107;seq=51#view=1up;seq=51.

[70] *New Secretary of the Army Takes Oath at the Pentagon*, N.Y. Times, July 22, 1955, at 7; Russell Baker, *President Shows Steady Progress; Mood Is Cheerful*, N.Y. Times, Oct. 5, 1955, at 1.

[71] *Sobeloff Is Sworn In*, N.Y. Times, July 20, 1956, at 28; *Rankin Appointed Solicitor General*, N.Y. Times, Aug. 15, 1956, at 22.

[72] Pub. L. No. 87-36, § 1(a), 75 Stat. 80; *FJC Biographical Directory*, Entry for Thurgood Marshall.

Gaspard d'Andelot Belin, General Counsel, Dep't of the Treasury[73]	11/13/1962	Robert H. Knight, resigned 10/6/1962

Appointments by Lyndon B. Johnson

William Gorham, Assistant Secretary, Dep't of Health, Education, and Welfare[74]	11/19/1965	new position, created 10/2/1965
William H. Darden, Judge, U.S. Court of Military Appeals[75]	11/5/1968	Paul J. Kilday, died 10/12/1968

Appointments by Richard M. Nixon

Hubert Pair, Judge, D.C. Ct. App.[76]	10/24/1970	new position, created 7/29/1970

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[73] *Treasury Counsel Resigns*, N.Y. Times, Oct. 6, 1962, at 21; *Boston Attorney Is Named Treasury General Counsel*, N.Y. Times, Nov. 15, 1962, at 60.

[74] Pub. L. No. 89-234, § 1(b), 79 Stat. 903; John D. Pomfret, *Problem: How to Administer the Great Society*, N.Y. Times, Nov. 21, 1965, at E5.

[75] *Judge Paul Joseph Kilday Dies; Sat in Military Court of Appeals*, N.Y. Times, Oct. 13, 1968, at 84; *Springfield Man Named to Bench*, Wash. Post, Nov. 6, 1968, at A21.

[76] District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, §§ 195(a)(1) and 199(b)(8), 84 Stat. 595, 598; Statement Announcing the Recess Appointment of Three Judges to the District of Columbia Court of Appeals, Pub. Papers 939 (Oct. 24, 1970).

Walter Yeagley, Judge, D.C. Ct. App.[77]	10/24/1970	new position, created 7/29/1970
Gerard Reilly, Judge, D.C. Ct. App.[78]	10/24/1970	new position, created 7/29/1970
Richard E. Wiley, Commissioner, Federal Communications Commission[79]	1/4/1972	Robert Wells, resigned 11/1/1971
Irving Kristol, Member of the Board of Directors, Corporation for Public Broadcasting[80]	12/15/1972	Saul Haas, died 10/15/1972

Appointment by Gerald Ford

Malcolm Toon, Ambassador to the Union of Soviet Socialist Republics[81]	11/24/1976	Walter John Stoessel, reassigned 9/13/1976

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[77] *Ibid.*

[78] *Ibid.*

[79] Federal Communications Commission, 7 Weekly Comp. Pres. Doc. 1580 (Nov. 30, 1971); Digest of Other White House Announcements, 8 Weekly Comp. Pres. Doc. 36 (Jan. 4, 1972).

[80] Corporation for Public Broadcasting, 8 Weekly Comp. Pres. Doc. 1763-1764 (Dec. 15, 1972).

[81] Office of the Historian, U.S. Dep't of State, *Walter John Stoessel (1920-1986)*, http://history.state.gov/departmenthistory/people/stoessel-walter-john; Office of the Historian, U.S. Dep't of State, *Malcolm Toon (1916-2009)*, http://history.state.gov/departmenthistory/people/toon-malcolm.

Appointments by Jimmy Carter

Neil Goldschmidt, Secretary of Transportation[82]	8/10/1979	Brock Adams, resigned 7/20/1979
Walter Heen, District Judge, D. Haw.[83]	1/1/1981	Dick Yin Wong, died 12/26/1978

Appointments by Ronald Reagan

Robert P. Hunter, Member, NLRB[84]	8/13/1981	John C. Truesdale, resigned 1/26/1981
John R. Van de Water, Member, NLRB[85]	8/13/1981	John A. Penello, resigned 1/14/1981

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[82] *Adams Angrily Quits Transportation Job*, N.Y. Times, July 21, 1979, at 1; *New Transportation Chief To Take Helm Wednesday*, Wash. Post, Aug. 11, 1979, at A4.

[83] *FJC Biographical Directory*, Entries for Walter Meheula Heen and Dick Yin Wong; *United States* v. *Woodley*, 751 F.2d 1008, 1009 (9th Cir. 1985) (en banc).

[84] *Aide Spurned By Reagan Named To N.L.R.B. Post*, N.Y. Times, Jan. 29, 1981, at A9; Nomination of Robert P. Hunter To Be a Member of the National Labor Relations Board, Pub. Papers 539-540 (June 18, 1981); Digest of Other White House Announcements, 17 Weekly Comp. Pres. Doc. 883 (Aug. 13, 1981).

[85] *Labor Panel Job Creates a Rift in Reagan Camp*, N.Y. Times, Jan. 16, 1981, at B5; Nomination of John R. Van de Water To Be a Member of the National Labor Relations Board, Pub. Papers 539 (June 18, 1981); Digest of Other White House Announcements, 17 Weekly Comp. Pres. Doc. 883 (Aug. 13, 1981).

John E. Higgins, Jr., Member, NLRB[86]	8/29/1988	Donald L. Dotson, term expired 12/16/1987
Dennis M. Devaney, Member, NLRB[87]	11/22/1988	Marshall B. Babson, resigned 7/31/1988

Appointments by George H.W. Bush

Clifford R. Oviatt, Jr, Member, NLRB[88]	12/14/1989	Wilford W. Johansen, resigned 6/15/1989
David J. Ryder, Director, U.S. Mint, Dep't of the Treasury[89]	9/3/1992	Donna Pope, term expired 8/1991

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[86] *Chief of U.S. Panel on Labor Relations to Quit Next Week*, N.Y. Times, Dec. 9, 1987, at A27; Digest of Other White House Announcements, 24 Weekly Comp. Pres. Doc. 1100 (Aug. 29, 1988).

[87] *Babson to Quit, Creating Third NLRB Vacancy*, Wash. Post, Mar. 3, 1988, at A23; *32 Are Appointed to Agencies During Congressional Recess*, N.Y. Times, Nov. 23, 1988, at D20; NLRB, *Members of the NLRB Since 1935*, www.nlrb.gov/members-nlrb-1935.

[88] NLRB News Release, *NLRB Member Wilford W. Johansen To Resign On or Before June 16, 1989* (Mar. 30, 1989), http://mynlrb.nlrb.gov/link/document.aspx/09031d4580ca48a6; Henry B. Hogue et al., Cong. Research Serv., *Memorandum re: The* Noel Canning *Decision and Recess Appointments Made from 1981-2013*, at 15 (Feb. 4, 2013) (*Hogue 1981-2013*).

[89] U.S. Mint, *Directors of the U.S. Mint: 1792–Present*, www.usmint.gov/about_the_mint/?action=past_directors; *Hogue 1981-2013*, at 13.

Lawrence Eagleburger, Secretary of State[90]	12/8/1992	James Baker, resigned 8/23/1992

Appointments by William J. Clinton

John C. Truesdale, Member, NLRB[91]	12/4/1998	William B. Gould IV, term expired 8/27/1998
John D. Hawke, Jr., Comptroller of the Currency[92]	12/7/1998	Eugene A. Ludwig, term expired 4/4/1998
Roger L. Gregory, Judge, U.S. Court of Appeals for the Fourth Circuit[93]	12/27/2000	new position, created 12/1/1990

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[90] *State Dept. Fills Posts After Baker Departure*, N.Y. Times, Aug. 25, 1992, at A10; *Hogue 1981-2013*, at 15.

[91] NLRB News Release, *In End Of Term Report, NLRB Chairman William B. Gould IV Assesses Initiatives, Accomplishments & Case Decisions* (Aug. 26, 1998), http://mynlrb.nlrb.gov/link/document.aspx/09031d4580ca4acf; *Hogue 1981-2013*, at 19.

[92] Office of the Comptroller of the Currency, *Past Comptrollers of the Currency*, www.occ.gov/about/who-we-are/leadership/past-comptrollers/index-past-comptrollers.html; *Hogue 1981-2013*, at 19.

[93] Federal Judgeship Act of 1990, Pub. L. No. 101-650, §§ 202(a)(2) and 206, 104 Stat. 5099, 5104; Remarks on the Recess Appointment of Roger L. Gregory to the United States Court of Appeals for the Fourth Circuit and an Exchange With Reporters, 3 Pub. Papers 2783 (Dec. 27, 2000).

Appointments by George W. Bush

Ronald E. Meisburg, Member, NLRB[94]	12/23/2003	R. Alexander Acosta, resigned 8/21/2003
William H. Pryor Jr., Judge, U.S. Court of Appeals for the Eleventh Circuit[95]	2/20/2004	Emmett Ripley Cox, assumed senior status 12/18/2000
John Bolton, Representative of the United States to the United Nations[96]	8/1/2005	John C. Danforth, resigned 1/2005
Gordon R. England, Deputy Secretary of Defense[97]	1/4/2006	Paul Wolfowitz, resigned 4/29/2005

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[94] Division of Information, NLRB, *Ronald Meisberg Receives Recess Appointment From President Bush To Be NLRB Member* (Dec. 29, 2003), http://mynlrb.nlrb.gov/link/document.aspx/09031d45800d5d75.

[95] *FJC Biographical Directory*, Entries for William Holcombe Pryor Jr. and Emmett Ripley Cox.

[96] Judith Miller, *Annan Planning Deep Changes in U.N. Structure, Aide Says*, N.Y. Times, Jan. 17, 2005, at A4; *Hogue 1981-2013*, at 24.

[97] *Pentagon Honors a Departing Wolfowitz*, N.Y. Times, Apr. 30, 2005, at A9; Digest of Other White House Announcements, 42 Weekly Comp. Pres. Doc. 20 (Jan. 4, 2006).

Peter N. Kirsanow, Member, NLRB[98]	1/4/2006	Ronald E. Meisburg, recess appointment expired 12/8/2004
Dennis P. Walsh, Member, NLRB[99]	1/17/2006	himself, term expired 12/16/2004

Appointments by Barack Obama

Joshua Gotbaum, Director, Pension Benefit Guaranty Corporation[100]	7/7/2010	Charles E.F. Millard, resigned 1/20/2009
James M. Cole, Deputy Attorney General, Dep't of Justice[101]	12/29/2010	David W. Ogden, resigned 2/5/2010

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[98] Division of Information, NLRB, *President Bush Recess Appoints Ronald Meisburg as NLRB General Counsel, Peter Kirsanow Board Member, and Arthur Rosenfeld FMCS Director* (Jan. 5, 2006), http://mynlrb.nlrb.gov/link/document.aspx/09031d45800d7041; Nominations Submitted to the Senate, 42 Weekly Comp. Pres. Doc. 228 (Feb. 10, 2006).

[99] Division of Information, NLRB, *Dennis Walsh Receives Recess Appointment From President Bush To Be NLRB Member* (Jan. 18, 2006), http://mynlrb.nlrb.gov/link/document.aspx/09031d45800d7043.

[100] Pension Benefit Guaranty Corporation, *Past PBGC Directors and Executive Directors*, www.pbgc.gov/about/who-we-are/pg/past-pbgc-directors-and-executive-directors.html; 155 Cong. Rec. 27,625 (2009); *Hogue 1981-2013*, at 28.

[101] Office of Public Affairs, Dep't of Justice, *Deputy Attorney General David Ogden to Leave Department of Justice*, Dec. 3, 2009, www.justice.gov/opa/pr/2009/December/09-ag-1300.html; *Hogue 1981-2013*, at 29.

Terence F. Flynn, Member, NLRB[102]	1/04/2012	Peter Schaumber, term expired 8/27/2010
Richard Griffin Jr., Member, NLRB[103]	1/04/2012	Wilma B. Liebman, term expired 8/27/2011

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[102] Pet. App. 16a.

[103] *Ibid.*

APPENDIX C

1. The United States Constitution provides in pertinent part:

Art. I:

* * * * *

§ 3:

Cl. 2:

> and if Vacancies [in the Senate] happen by Resignation or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

* * * * *

Cl. 5:

> The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

* * * * *

§ 4, Cl. 2:

> The Congress shall assemble at least once in every Year and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

* * * * *

§ 5, Cl. 4:

> Neither House, during the Session of the Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

* * * * *

§ 7, Cl. 2:

> If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

* * * * *

Art. II:

§ 2, Cl. 2:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers as they think proper, in the President

alone, in the Courts of Law, or in the Heads of Departments.

* * * * *

§ 3:

[The President] shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

* * * * *

Amend. XX, § 2:

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

2. 29 U.S.C. 153 provides, in pertinent part:

National Labor Relations Board

(a) Creation, composition, appointment, and tenure; Chairman; removal of members

The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. § 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors,

and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, consti-

tute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

* * * * *

3. 29 U.S.C. 160 provides, in pertinent part:

Prevention of unfair labor practices

* * * * *

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the

Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
MAY 23 2013
OFFICE OF THE CLERK

No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

BRIEF OF RESPONDENT NOEL CANNING

GARY E. LOFLAND
HALVERSON NORTHWEST LAW GROUP
405 E. Lincoln Ave.
Yakima, WA
Telephone: (509) 452-2828

LILY FU CLAFFEE
RACHEL L. BRAND
STEVEN P. LEHOTSKY
SHELDON GILBERT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Telephone: (202) 463-5337

NOEL J. FRANCISCO
Counsel of Record
G. ROGER KING
JAMES M. BURNHAM
JONES DAY
51 Louisiana Ave, N.W.
Washington, D.C. 20001
njfrancisco@jonesday.com
Telephone: (202) 879-3939

Counsel for Respondent

QUESTIONS PRESENTED

The questions presented by the Government are as follows:

1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate.

2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

Respondent proposes that the following question presented be added as well:

3. Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.

PARTIES TO THE PROCEEDING

Petitioner is the National Labor Relations Board.

Respondent is Noel Canning, a division of the Noel Corporation.

The International Brotherhood of Teamsters Local 760 is also a party to this proceeding as it was an intervenor in the court of appeals.

RULE 29.6 DISCLOSURE

Respondent Noel Canning is a division of The Noel Corporation. Noel Canning has no other parent corporations, and no other publicly held company has a 10% or greater ownership interest in Noel Canning. Noel Canning is engaged in the bottling and distribution of soft drinks in Central and Eastern Washington and Northern Oregon.

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STATEMENT OF THE CASE

On January 4, 2012, the President purported to appoint Sharon Block, Terence Flynn, and Richard Griffin to serve as Members of the National Labor Relations Board (the "Board"). Even though (1) the Senate had convened the day before to commence the Second Session of the 112th Congress, (2) the Senate convened another session two days later, and (3) the vacancies to which these individuals were appointed all arose prior to the supposed "recess," the President asserted that these appointments were to "fill up . . . Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. In so doing, the President did something that none of his predecessors had ever before done: He attempted to make intrasession "recess" appointments during a three-day break in Senate business. The Board then proceeded to issue a number of orders, including the one against Respondent Noel Canning, all of which presumed that Ms. Block and Messrs. Flynn and Griffin had been lawfully appointed.

Set forth below are the facts and circumstances surrounding this unprecedented assertion of executive power.

1. Under 29 U.S.C. § 153(b), the Board may not operate unless it has a quorum of three lawfully appointed members. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010). Prior to January 3, 2012, the Board operated with two Senate-confirmed members—Chairman Pearce and Member Hayes, both of whom were confirmed by the Senate on June 22, 2010—and a third—Craig Becker—who had been "recess" appointed on March 27, 2010, during a seventeen-day intrasession

"recess." *See* 156 Cong. Rec. D355 (daily ed. Mar. 26, 2010). Even if Becker's 2010 "recess" appointment were valid, it is undisputed that it expired, at the latest, on January 3, 2012, when the first Session of the 112th Congress concluded and the second Session began. *See* U.S. Const. art. II, § 2, cl. 3. Consequently, on January 3, 2012, the Board had only two members and lacked the statutorily required quorum.

a. At that time, the Senate was operating under an adjournment order adopted on December 17, 2011. The adjournment order required the Senate to convene into "pro forma sessions" every three days:

> I ask unanimous consent that when the Senate completes its business today, it adjourn and convene for pro forma sessions only, with no business conducted on [December 20, December 23, December 27, December 30, January 3, January 6, January 10, January 13, January 17, and January 20] . . . and that following each pro forma session the Senate adjourn until the following pro forma session.

Pet.App. 91a. The Senate had to convene regular sessions to satisfy its obligation under the Constitution's Adjournment Clause, which provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days[.]" U.S. Const. art. I, § 5, cl. 4. Here, the House of Representatives did not consent to a Senate adjournment exceeding three days, and the Senate satisfied the Adjournment Clause by convening so-called "pro forma" sessions. These sessions are commonly referred to as "pro forma" sessions due to their short duration. *See, e.g.*,

Henry B. Hogue, Congressional Research Service, RS 21308, *Recess Appointments: Frequently Asked Questions* 4 (2012).[1]

Since the 1920's, Congress has "commonly and without objection" used pro forma sessions to satisfy the Adjournment Clause.[2] 158 Cong. Rec. S114 (daily ed. Jan. 26, 2012) (Sen. Lee). The Senate is fully capable of conducting business at pro forma sessions. For example, on December 23, when operating in accordance with the adjournment order quoted above (the same order in effect on the day of the appointments at issue), the Senate passed (and the President signed) "a 2-month extension of the reduced payroll tax, unemployment insurance, TANF, and the Medicare payment fix[.]" 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). And on January 3, 2012, the Senate convened a "pro forma" session to satisfy its constitutional obligation under the Twentieth Amendment to "meet[] . . . on the 3d day of January." U.S. Const. amend. XX, § 2. Similarly, on August 5, 2011, the Senate passed (and the President signed) the Airport and Airway Extension Act of 2011, 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011), during a "pro forma" session convened pursuant to an adjournment order indistinguishable from the

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[1] Sundays do not count for legislative time computations, such that four-day breaks including a Sunday are interchangeable with three-day breaks not including a Sunday. Sunday is a *dies non* in congressional practice. 5 Asher C. Hinds, *Hinds' Precedents of the House of Representatives* § 6673 (1907).

[2] *See, e.g.*, 8 Clarence Cannon, *Precedents of the House of Representatives* § 3369, at 820 (1935) (describing a 1929 instance where the House "provid[ed] for merely formal sessions"); 95 Cong. Rec. 12,586 (Aug. 31, 1949) (Senate pro forma session).

adjournment order here, *see* 157 Cong. Rec. S5292 (daily ed. Aug. 2, 2011). Each of these actions was taken by unanimous consent, which is the same procedure the Senate uses to pass most legislation and confirm most nominees. *See* Elizabeth Rybicki, Cong. Research Serv., RL 31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure* 9 (2013).

Moreover, until now, the political branches have recognized that pro forma sessions preclude recess appointments. Senator Robert Byrd first invoked them in 1985 as part of a compromise with President Reagan, in which the President agreed to provide the names of potential recess appointees "in sufficient time in advance that [the Senate] could prepare for it either by agreeing in advance to the confirmation of that appointment or by not going into recess and staying in pro forma so the recess appointments could not take place." 145 Cong. Rec. 29,915 (1999) (Sen. Inhofe). Implicit in this compromise was the shared premise that the Senate could have prevented the President from making recess appointments by convening pro forma sessions. Senator Reid continued the practice in 2007, successfully preventing President Bush from making recess appointments. *See* Hogue, *supra* at 8. The current Administration has likewise acknowledged that pro forma sessions preclude recess appointments, explaining to this Court in *New Process Steel* that "the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007," Letter from Elena Kagan, Solicitor General, to William K. Suter, Clerk, Supreme Court of the United States 3 (April 26, 2010), *New Process Steel*, 130 S. Ct. 2635 (No. 08-1457) ("Solicitor General

Letter"), including when the Senate was convening pro forma sessions every three days, *see* 153 Cong. Rec. S14609 (daily ed. Nov. 16, 2007) (Sen. Reid) ("[T]he Senate will be coming in for pro forma sessions . . . to prevent recess appointments.").

Thus, until January 4, 2012—when the President made the appointments at issue—no President had ever attempted to make recess appointments where the Senate was convening in pro forma sessions every three days.

b. Nevertheless, on January 4, 2012, the President unilaterally asserted that the Senate was in "recess" and proceeded to make the appointments at issue, making him the first President in history to attempt an intrasession recess appointment while the Senate was convening sessions every three days.

The nominations for two of the three appointees—Block and Griffin—were quite recent at the time. The President had nominated Block and Griffin just three weeks earlier, and on the day of the appointments, their committee questionnaires and background checks had not even been submitted to the Senate. *See* Press Release, U.S. Senate Committee on Health, Education, Labor & Pensions, *NLRB Recess Appointments Show Contempt for Small Businesses* (Jan. 4, 2012).

The next week, the Department of Justice's Office of Legal Counsel released a memorandum, dated January 6, 2012, outlining the legal rationale underlying the appointments. The OLC Memorandum asserted that "the President is . . . vested with . . . discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate,"

concluding that the Senate is in recess whenever the President determines that it is "unavailable . . . to 'receive communications from the President or participate as a body in making appointments.'" *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. slip op. at 5 (2012) ("OLC Memo") (citation omitted). Key to this conclusion was the assertion that "Congress's provision for pro forma sessions . . . does not have the legal effect of interrupting the recess of the Senate for purposes of the Recess Appointments Clause." *Id.* at 9.

2. Noel Canning is a company engaged in the bottling and distribution of soft drinks in Yakima, Washington and is part of the Noel Corporation. The Board's decision involves a dispute between Noel Canning and Teamsters Local 760, in which the Board found that Noel Canning violated the National Labor Relations Act by refusing to execute and enter a collective bargaining agreement that had allegedly been verbally agreed upon. Pet.App. 2a.

The Administrative Law Judge's Order against Noel Canning was issued in September of 2011. Shortly thereafter, Noel Canning filed exceptions before the Board, and fully completed its related briefing on December 27, 2011—eight days before the President made the "recess" appointments at issue. Resp. C.A. App. A3. The Board then issued its decision against Noel Canning on February 8, 2012. Pet.App. 2a.

3. Noel Canning promptly filed a Petition for Review in the United States Court of Appeals for the D.C. Circuit, challenging the validity of the "recess" appointments, and thus the Board's quorum. Noel

Canning pointed out that, under longstanding Executive Branch practice, the President could not make intrasession "recess" appointments where, as here, the Senate had not adjourned for more than three days under the Adjournment Clause. When Attorney General Daugherty first asserted the authority to make intrasession recess appointments in 1921, he acknowledged that "no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of [three days] is taken." *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921). Daugherty thus determined that the Adjournment Clause's three-day rule set the constitutional floor for intrasession recess appointments. Resp. C.A. Br. 29-68. Noel Canning further argued that under the original meaning of the Recess Appointments Clause, the President's recess-appointment power was (1) "limited to *inter*session recesses (those occurring between sessions)" and (2) could only be used to "make recess appointments . . . to positions that became vacant *during* the recess." *Id.* at 70-71.[3]

4. The court of appeals granted the Petition for Review, agreeing with Noel Canning that the appointments violated the Clause as originally

[3] The Teamsters erroneously contend that the D.C. Circuit's holding was "based on an interpretation of the Recess Appointments Clause that had not been advanced by any party or amicus." Teamster's Br. 3. But as counsel delivering argument on behalf of Noel Canning explained at argument below: "We have briefed [those] issues, they are in the briefs, they're presented to the Court for decision." C.A. Or. Arg. Tr. 13. Moreover, Amicus Landmark Legal Foundation devoted virtually its entire brief to the original understanding of the Recess Appointments Clause. *See* Amicus Landmark Legal C.A. Br. 6-19.

understood, and not addressing its narrower argument. The court noted that Noel Canning had no obligation to ask the Board to decide issues it lacked the power to adjudicate, Pet.App. 11a-15a, and proceeded to consider Noel Canning's constitutional arguments on the merits. The court first held that the appointments violated the Recess Appointments Clause's limitation to "the Recess" that corresponds to every Senate "Session," i.e., the intersession recess. Pet.App. 18a-35a.[4] A majority of the panel further held that recess appointments can be used only to fill those vacancies which "happen during the recess of the Senate." *Id.* 35a-52a. The court of appeals thus held that, as the Board "conceded at oral argument," the "appointments at issue were not made during the intersession recess" and were therefore invalid. *Id.* 34a. A majority of the panel further held that the appointments were invalid because vacancies must be filled "during the same recess in which [they] arose." *Id.* 51a.

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[4] On May 16, 2013, the Third Circuit joined the D.C. Circuit in holding that the President's recess appointments authority obtains only during an intersession recess and, therefore, the President's appointment of Craig Becker as a Member of the Board on March 27, 2010, was invalid because it was during an intrasession break. *NLRB v. New Vista Nursing and Rehab.*, Nos. 11-3440, 12-1027, 12-1936, 2013 WL 2099742, at *11-30 (3d Cir. May 16, 2013). The court considered the legality of Becker's "recess" appointment *sua sponte* (the Petitioner had not challenged that appointment in its petition for review), after determining that the three-member-composition requirement for a panel of the NLRB was jurisdictional. *Id.* at *11-19. Because the court did not address the January 4, 2012, appointments at issue in this case, the court was not squarely presented with the Government's claim that pro forma sessions are constitutional nullities.

ARGUMENT

Respondent does not oppose certiorari because this case presents a constitutional question of extreme importance. The D.C. Circuit's decision further calls into question the current authority of two major executive agencies to perform their statutory duties, a question of particular import given that the D.C. Circuit effectively has national jurisdiction over the federal Government.[5] Certiorari is therefore appropriate.

The Government, however, has phrased the questions presented so narrowly that answering them could potentially leave the validity of the "recess" appointments at issue unresolved. In particular, the Government's proposed questions do not encompass the core issue of whether the President may make "recess" appointments where, as here, the Senate is convening "sessions" every three days. If the Court grants certiorari, it should decline to adopt only the abstract questions presented by the Government—questions that, even if (erroneously) resolved in the Government's favor, would *not* decide this case and would *not* resolve the validity of "every final decision of the Board since January 4, 2012." Pet'n 30. While the Respondent is always free, and would remain free, to argue any basis for affirmance supported by the record, *see, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994), the more prudent course would be for the Court to adopt an additional Question Presented that explicitly encompasses the validity of the appointments here.

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[5] At the same time the President made the appointments at issue here, he purported to "recess" appoint Richard Cordray as head of the Consumer Financial Protection Bureau.

Doing so would ensure that the Court benefits from full briefing on all constitutional issues underlying the D.C. Circuit's judgment, maximize the Court's flexibility in resolving this dispute, and, most importantly, ensure that the Board is not hampered by additional litigation over the January 4, 2012, "recess" appointments in the event that this Court rejects the two rationales relied upon by the court of appeals. To facilitate the Court's consideration, Respondent has proposed an additional Question Presented. In the alternative, the Court could rephrase the Question Presented to address "whether the President's January 4, 2012, 'recess' appointments to the National Labor Relations Board were invalid."

If the Court grants certiorari, it should affirm the court of appeals. Both rationales on which the court of appeals relied to invalidate the January 4, 2012, appointments were correct. The supposed "recess" occurred during the Senate's Session, and the relevant vacancies all predated that Session, such that these appointments violated *both* of the Clause's clear textual limits. Moreover, the President made these appointments during a three-day break, at a time when the Senate was fully capable of confirming nominees. For all of these reasons, the judgment of the court of appeals was correct.

I. THE D.C. CIRCUIT'S RATIONALES FOR INVALIDATING THE JANUARY 4, 2012, APPOINTMENTS WERE CORRECT.

A. The President Has The Power To Make Recess Appointments Only During Intersession Recesses.

For the first century-and-a-half of the Republic, no President asserted the power to make intrasession recess appointments.[6] That is likely because this modern practice contravenes the plain text of the Clause and conflicts with the long history that predates this practice's conception. The D.C. Circuit was thus entirely correct to hold that the President's recess appointment power is limited to "the Recess" that occurs between each Senate Session.

1. Foremost, as the D.C. Circuit explained, the Clause refers to "the Recess" rather than "a Recess." Pet.App. 19a-20a. By using the definite article, the Clause limits its application to a specific type of "recess"—"the Recess" that occurs following each Senate Session. Had the Founders meant "any Recess," the Clause would say "during *a* Recess of the Senate." The Government's interpretation, by contrast, requires ignoring "the," focusing on "Recess," and then defining "recess" to mean any "'period of cessation from usual work.'" Pet'n 13

[6] The Government notes that President Andrew Johnson may have made intrasession recess appointments. Pet'n 22. But the Johnson Administration never publicly acknowledged that these appointments were made during the Senate's Session and never attempted to justify their legality. Moreover, all were made "when Johnson was battling with the Republican Congress that impeached him." Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1572 (2005).

(quoting 13 *Oxford English Dictionary* 322-23 (2d ed. 1989)). If that were the correct construction, then the Clause would allow recess appointments during *any* break in Senate business, including at lunchtime or overnight. That, however, is obviously not what the Constitution provides, as even the Government concedes. The Clause refers to "*the* Recess" and must be read in its entirety.

The Clause's structure confirms what the text suggests. By providing that a recess appointment expires "at the End of [the Senate's] next Session," U.S. Const. art. II, § 2, cl. 3, the Clause creates a "dichotomy" between "'the Recess' and the 'Session,'" under which "the Senate is in session, or it is in the recess." Pet.App. 20a. The Clause likewise deploys textual symmetry between "the Recess" and the Senate's "next Session." Appointments are permitted during "the Recess" preceding the "next Session," and that "next Session" then delimits the length of any such appointments. All recess appointees serve for one Senate Session, ensuring that the Senate always has one full Session to consider confirmation. Once the Senate has that opportunity to act, the need for an emergency appointment dissipates. As Justice Story long-ago explained, "the president should be authorized to make temporary appointments during the recess, which should expire, when the senate should have had an opportunity to act on the subject." 3 Joseph L. Story, *Commentaries on the Constitution of the United States* § 1551 (1833); *see also New Vista Nursing*, 2013 WL 2099742, at *22 ("The Clause's function is [] fulfilled once an opportunity for the Senate to act has come and gone.").

Finally, the Government's interpretation creates an inexplicable anomaly: intrasession recess appointees serve twice as long as their intersession counterparts. Recess appointments "expire at the End of [the Senate's] next Session." Under the correct construction of the Clause, such appointments can only be made in the intersession break and all therefore last one Senate Session. Under the Government's view, however, appointments can be made in breaks *during* a Session, which means that some last nearly two years (until the end of *that* Session *and* the "next Session"). That is precisely what happened here. The Government claims that these "recess" appointments were made on the second day of the Second Session of the 112th Congress, such that they last through the remainder of that Session, as well as the entire First Session of the 113th Congress (the "next Session"). The Government offers no explanation for why the Constitution would empower Presidents to double the length of recess appointments through strategic timing. None exists.

2. The Clause's history and application decisively support this construction. Most importantly, other than a few unexplained appointments by President Andrew Johnson, *see supra*, no President attempted to make intrasession recess appointments until the 1920s (or really the 1940s). *See* Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2212 (1994) ("Frequent presidential use of the recess appointment power during intrasession recesses began in 1947."); *see also New Vista*, 2013 WL 2099742, at *25 ("From ratification until 1921, there was a rough consensus that recess appointments could be made only during intersession breaks.").

And even then, Presidents were initially sparing in their use of this "power," with President Carter being perhaps "the first modern president to utilize the clause expressly to avoid the Senate's advice and consent." Carrier, *supra*, at 2213. That century-and-a-half of executive restraint strongly "suggests an assumed *absence* of such power." *Printz v. United States*, 521 U.S. 898, 908 (1997); *see also* Pet.App. 24a (the "early understanding of the Constitution" is "more probative of its original meaning than anything to be drawn from administrations of more recent vintage").[7]

The Government's attempt to marshal contrary historical examples only proves how wrong it is. For instance, as its leading example, the Government notes that "the Articles of Confederation empowered the Continental Congress to convene the Committee of the States 'in *the recess* of Congress,'" Pet'n 13 (quoting Articles of Confederation of 1781, Art. IX, Para. 5, and Art. X, Para. 1), and then asserts that "[t]he one occasion on which that authority was exercised was an intra-session recess." Pet'n 14. That is incorrect.

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[7] The Government's observation that "until the Civil War, there were no intra-session recesses longer than 14 days," Pet'n 22, is irrelevant. Foremost, the Government completely ignores the *post*-Civil War *decades* of executive restraint. And further, the Government recognizes that there were multiple intrasession recesses pre-Civil War, *id.*—and even more if one were to adopt a definition of "the Recess" that encompasses every "'[r]emission or suspension of business or procedure.'" *Id.* at 13 (quoting 2 Noah Webster, *An American Dictionary of the English Language* 51 (1828)). That no President attempted to make recess appointments during any of those breaks strongly suggests that no President believed such appointments would be lawful.

It is true that: (1) the Articles of Confederation empowered the Continental Congress to convene a Committee of the States "in the recess of Congress," Articles of Confederation of 1781, art. IX, para. 5; (2) the Articles provided for Congress to convene "on the first Monday in November," *id.*, art. V, para. 1; and (3) in the example the Government invokes, the Continental Congress "adjourned . . . to meet at Trenton on the 30th day of October next," 27 *Journals of the Continental Congress* 555-56 (Gaillard Hunt ed., 1784). What the Government overlooks, however, is that the Journals of the Continental Congress reflect *no meeting* on October 30, 1784—a *Saturday*. Rather, the Congress reconvened to commence the new congressional Session on the subsequent Monday, "the first Monday in November" of 1784, just as the Articles of Confederation provided. *See id.* at 641 ("Trenton, Monday, November 1, 1784"). This means, of course, that the recess the Government invokes was actually an *inter*session recess rather than an *intra*session recess. The fact that the Continental Congress never convened a Committee of the States outside of this intersession recess further confirms that "the Recess" means "the Recess" which follows each Congressional "Session."[8]

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[8] The Government appears to make a similar mistake in invoking supposed intrasession recesses in Pennsylvania and Vermont at Pet'n 14. *See* Robert G. Natelson, *The Origins and Meaning of 'vacancies that may happen during the Recess' in the Constitution's Recess Appointments Clause*, 37 Harvard J.L. & Pub. Pol'y at 18 n.61 (forthcoming 2014), *available at* http://ssrn.com/abstract=2257801 (explaining that the same Vermont recess the Government invokes was an *inter*session recess and providing similar examples from Pennsylvania).

Moreover, numerous provisions in other founding-era legislative documents explicitly use "the recess" to describe the break between legislative sessions. For example, the Massachusetts Constitution stated:

> The Governor, with advice of Council, shall have full power and authority, during the session of the General Court [that is, the Massachusetts legislature], to adjourn or prorogue the same at any time the two Houses shall desire; . . *and, in the recess of the said Court, to prorogue the same, from time to time, not exceeding ninety days in any one recess*; and to call it together sooner than the time to which it may be adjourned or prorogued, if the welfare of the Commonwealth shall require the same.

Mass. Const. of 1780, pt. 2, ch. 2, § 1, art. V (emphasis added). This provision sets up a dichotomy between "the session of the General Court" (wherein the Governor may "adjourn or prorogue") and "the recess of the said Court" (wherein the Governor may only "prorogue" for up to "ninety days"). By creating a dichotomy between "the session" and "the recess," the Massachusetts Constitution made clear that "the recess" could never occur *during* a legislative session and thus could occur only *between* legislative sessions. *See also New Vista*, 2013 WL 2099742, at *15 n.15 (explaining as much). Numerous other contemporaneous founding-era state constitutions and legislative documents likewise use "the recess" to refer to intersession recesses only. *See, e.g.*, Natelson, *supra*, at 20-24.

Finally, the Government cites stray uses of "the recess" in personal correspondence and speeches on unrelated topics. Pet'n at 14. For example, the

Government invokes the following letter from George Washington:

> I regret not having had it in my power to visit New York during the adjournment of the Convention, last Month.—not foreseeing with any precission the period at which it was likely to take place or the length of it, I had put my carriage in the hands of a workman to be repaired and had not the means of mooving during the recess but with, or the curtisy, of others. . . .

3 *The Records of the Federal Convention of 1787* 76 (Max Farrand ed., 1911) (letter to John Jay). Plainly, the future first President was not engaging in legal analysis.

In any event, these colloquial uses of the term "recess" prove too much. Legislators routinely refer to all sorts of breaks—lunch breaks, weekend breaks, ten-minute breaks—as being "recesses." *See, e.g.*, 158 Cong. Rec. S3388 (daily ed. May 21, 2012) ("Senate recess from 12:30 until 2:15 p.m. to allow for the weekly caucus meetings"); 158 Cong. Rec. S3154 (daily ed. May 15, 2012) ("the Senate, at 12:40 p.m., recessed until 2:15 p.m"); 154 Cong. Rec. S7578 (daily ed. July 28, 2008) ("stand in recess until 10 a.m. [tomorrow]"). But not even the Government claims that the President may make recess appointments every time the Senators break for lunch. *See* Pet'n 27.

3. The Clause's purpose supports what the text says and the history shows. Alexander Hamilton explained that "[t]he ordinary power of appointment is confided to the President and Senate *jointly*," with the recess appointment power embodying a mere

"auxiliary method of appointment, in cases to which the general method was inadequate." *The Federalist No. 67*, at 409 (Hamilton) (Clinton Rossiter ed., 1961). The Founders greatly preferred the "general method," *id.*, because Senate confirmation provided "an excellent check upon a spirit of favouritism in the President," *The Federalist No. 76*, at 457 (Hamilton) (Clinton Rossiter ed., 1961), and thus confined the "auxiliary method" to "temporary appointments 'during the recess of the Senate,'" *id.* at 409 (Federalist 67). The Federalist Papers make clear that the "central purpose" of the Clause is to provide an emergency power available only in narrow circumstances, not a broad power that could enable the "auxiliary method" to swallow the "general" rule by giving the President unfettered "discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments." OLC Memo at 23.

The Government notes that "in recent decades, the Senate's intra-session recesses have often lasted longer than its inter-session recesses." Pet'n 15. But that, too, only undermines the Government's position. Intrasession recesses have become more common due to technological advances, which enable Senators to conveniently travel to their states throughout the Session. Nowadays, Senators are likewise perpetually available to receive Presidential requests and tend to governmental business. This increase in Senate availability should *lessen* the frequency of recess appointments because it eliminates the condition—Senate unavailability—which justified them in the first place.

Yet, instead, the opposite has happened, with over half of all intrasession recess appointments occurring in the last 30 years. Pet'n 17-18 (noting that there have been over 300 intrasession recess appointments since 1981). What was originally intended as an emergency stop-gap power is thus being transformed by the Executive Branch into the very "absolute power of appointment" that the Framers rejected. *The Federalist No. 76*, *supra*, at 456; *see also INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[O]ur inquiry is sharpened rather than blunted by the fact that [the challenged practice is] appearing with increasing frequency.").

4. The Government claims that a 1905 Senate Judiciary Committee Report endorses a "functional approach," under which "the Recess" includes intrasession breaks. Pet'n 16. But the Government draws this conclusion only by divorcing the Report from its historical context. That context makes clear that the Committee's Report was intended to ensure that only substantial *inter*session breaks enabled recess appointments. The Report does not even address—let alone endorse—the possibility of *intra*session appointments. Indeed, just four years before the Senate Committee issued its Report, the Executive Branch expressly *disclaimed* the authority to make intrasession recess appointments.

On December 24, 1901, Attorney General Knox wrote a letter to President Theodore Roosevelt advising the President that he lacked the power to make recess appointments during intrasession breaks. Knox began by observing "that the phrase" in the Clause is "'*the* recess.'" *President – Appointment of Officers – Holiday Recess*, 23 Op.

Att'y Gen. 599, 600 (1901) (emphasis in original). Knox explained that the "period following the final adjournment for the session" is "*the recess* during which the President has power to fill vacancies by granting commissions which shall expire at the end of the next session." *Id.* at 601 (emphasis in original). An intrasession break, by contrast, "is not such recess, although it may be *a* recess in the general and ordinary use of that term." *Id.* (emphasis in original).

The ink was hardly dry on Knox's letter when the Senate Judiciary Committee published its Report. Moreover, the Committee published this Report in objection to President Roosevelt's making intersession recess appointments at a time when the Senate had not gone into recess, on the basis of Roosevelt's assertion that "the Recess" occurred in "the brief instant between . . . two gavel strikes." Rappaport, *supra*, at 1555 n.209. It is thus clear that the Committee—which drafted its Report to *protest* an improper use of the President's *inter*session recess appointments power at a time when *no* President had *ever* asserted the power to make *intra*session recess appointments—never intended to endorse a free-floating "functional" test in which any break can become "the Recess." The 1905 report therefore does not even arguably support the Government's broad view of the Executive's recess appointments power.[9]

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[9] The Teamsters claim that the Committee's Report "reject[ed] Attorney General Knox's understanding [of] the term 'recess' as used in the Recess Appointments Clause . . " Teamsters Br. 6. The Teamsters provide no authority for this assertion, which is clearly wrong. The Committee's Report never mentions Knox's opinion and certainly never concedes that the President's recess appointments power exists during all Senate breaks. To the contrary, the Senate clearly believed—as did every Executive

5. Finally, the Government assures the Court that despite modern Presidents adopting the intrasession construction, there has been no "evasion" of the advice-and-consent requirement. Pet'n 22. The January 4, 2012, appointments definitively refute this claim. The same day that the President purported to appoint the Board members at issue, he also "recess" appointed Richard Cordray as the head of the Consumer Financial Protection Bureau. That appointment was made for the *explicit purpose* of evading advice and consent. As the President stated at the time: "I refuse to take no for an answer."[10] The President's view was that "when Congress refuses to act . . . I have an obligation as President to do what I can without them." *Id.* Preventing such evasion is, of course, precisely why the separation of powers doctrine establishes "high walls and clear distinctions." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995); *see also, e.g.*, *New Vista*, 2013 WL 2099742, at *28 ("[T]he Board's . . . unavailable-for-business criteria are almost by definition a 'low wall' that contain 'vague distinctions' which will

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(continued...)

official to opine on the topic by that point—that the Clause is limited to *inter*session recesses only: "The theory of 'constructive recess' constitutes a heavy draft upon the imagination, for it involves a constructive *ending of one session*, a constructive *beginning of another*, and a constructive recess *between the two*." S. Rep. No. 58-4389, at 3 (1905), *reprinted in* 39 Cong. Rec. 3823, 3824 (emphases added).

[10] The White House, Remarks by the President on the Economy, http://www.whitehouse.gov/photos-and-video/video/2012/01/04/president-obama-speaks-appointing-richard-cordray#transcript.

make them difficult for the Senate and the president to predictably apply.").

The Government also notes that the court of appeals' decision "would allow the Senate to disable the President from making recess appointments even when the Senate is unavailable to give its advice and consent." Pet'n 23. But should the President ever need the Senate's attention while the Senators are away, the President retains the power to convene the Senate for the purpose of confirming nominees. U.S. Const. art. II, § 3 ("[The President] may, on extraordinary Occasions, convene both Houses, or either of them . . . ."). And regardless, the Senate would *still* have the power to foreclose recess appointments while refusing to confirm nominees under the Government's construction of the Recess Appointments Clause. *See* OLC Memo at 1 ("The Senate could remove the basis for the President's exercise of his recess appointment authority by remaining continuously in session . . . .").

B. The President Cannot Use Recess Appointments To Fill Preexisting Vacancies.

Similarly, whether the President could use his recess appointments power to fill vacancies that arose during the Senate's session and continued into the recess is an issue that occurred frequently in the years following ratification. There is thus a great deal of historical evidence, and it demonstrates that the Founders did not believe Presidents could make recess appointments to fill vacancies that arose prior to "the Recess." This makes sense, given that the text could not be clearer: recess appointments may be used to fill only those "Vacancies that may happen

during the Recess." U.S. Const. art. II, § 2, cl. 3. Here too, the D.C. Circuit was correct.

1. The Recess Appointments Clause empowers the President to "fill up all Vacancies that may happen during the Recess." U.S. Const. art. II, § 2, cl. 3. In 1789, "happen" was (as it still is) a verb that expresses the sudden occurrence of an event. *See, e.g.*, 1 Samuel Johnson, *A Dictionary of the English Language* 965 (1755) (defining "[h]appen" as "[t]o fall out; to chance; to come to pass"); Natelson, *supra*, at 36-37 (gathering similar definitions from other founding-era dictionaries). Plainly, an event "'come[s] to pass,' only when it first arises." Pet.App. 36a-37a. Thus, the only sensible reading of the text is that the vacancy must "fall out" or "come to pass" during the recess.

The Government contends "that may happen" really means "that happen *to exist*." Pet'n 27 (emphasis added). But in addition to being textually implausible, this strained interpretation would "effectively read[] the phrase out of the Clause." Pet.App. 36a. If the phrase "happen during" really meant "happen to exist during," then the words add nothing but ambiguity. Had the Founders intended for recess appointments to be available for filling all vacancies—whenever those vacancies arose—then they would have written the provision as follows: "The President shall have Power to fill up all Vacancies ~~that may happen~~ during the Recess of the Senate." This is, perhaps, why even Attorney General William Wirt, the first to adopt the Executive Branch's interpretation, readily conceded that the arise-during construction (embraced by the court of appeals) "is, perhaps, more strictly consonant

with the mere letter" of the Constitution. *Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. 631, 633-34 (1823); *see also* Natelson, *supra*, at 41-47 (collecting numerous founding-era examples of "happen" referring to a discrete event).

2. Here, too, history confirms what the text says. The nation's first Attorney General, Edmund Randolph, authored an opinion denying the President's authority to fill vacancies that first arose during a Senate Session. *See* Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), *in* 24 *The Papers of Thomas Jefferson* 165-67 (John Catanzariti et al. eds., 1990). Randolph explained that, consistent with the purpose of the Recess Appointments Clause as an emergency device, its terms must be "interpreted strictly." *Id.* at 166. Numerous other founding-era figures agreed. *See, e.g.*, Rappaport, *supra*, at 1518 ("A wide range of leading figures from the Framers' generation read the Recess Appointments Clause to [authorize only the filling of vacancies that arise during recesses]."); *see also* Pet.App. 40a (Senator Christopher Gore arguing that "'[i]f the vacancy happens at another time, it is not the case described by the Constitution; for that specifies the precise space of time wherein the vacancy must happen . . . .'") (quoting 26 Annals of Cong. 653 (1814)).

Further, President Washington regularly followed a procedure whereby he would nominate appointees without their consent prior to the recess and attempt to secure confirmation. Pet.App. 38a-39a. Then, if the person declined the appointment, he would treat the ensuing vacancy as one which "happened" during the recess. *Id.* Had President Washington and the

early Senate "understood the word 'happen' to mean 'happen to exist,' this convoluted process would have been unnecessary." *Id.* 39a.

The Government's counter-examples are unpersuasive. First, the Government argues that President John Adams endorsed the "happen to exist" interpretation, though the Government notes that Adams ultimately declined to act on that view. Pet'n 24 n.9. In so noting, the Government glosses over the fact that Adams likely failed to act because everyone consulted appears to have advised that Adams could *not* use recess appointments to fill preexisting vacancies. In addition to the then-outstanding opinion of Attorney General Randolph (noted above):

- Adams's Secretary of War, James McHenry, who received the President's query, doubted that the "happen to exist" interpretation was correct. As he noted in inquiring with Alexander Hamilton: "It would seem, that under this Constitutional power, the President cannot alone make certain appointments or fill up vacancies that may happen during a session of the senate . . . ." 23 *The Papers of Alexander Hamilton* 70 (Harold Syrett ed., 1976).
- Hamilton's response confirmed McHenry's doubt: "It is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate." *Id.* at 94.
- McHenry also consulted Adams's Attorney General, Charles Lee, "who considered an office created during the session of the Senate, and not filled by appointment, by and with the advice and consent of the Senate, as a vacancy

> happening during the session, which the President cannot fill, during the recess . . . ." 8 *The Works of John Adams* 647 n.1 (Charles Francis Adams ed., 1853).

The Government also invokes recess appointments by President Washington that supposedly filled preexisting vacancies. Pet'n 25. But whatever the underlying facts, *see* Pet.App. 38a-39a, President Washington clearly *believed* that his recess appointments filled vacancies that arose during the recess. When informing the Senate of his appointments, Washington carefully explained: "I nominate the following persons to fill the offices annexed to their names respectively; to which, having *fallen vacant during the recess of the Senate*, they have been appointed." S. Journal, 3d Cong., 1st Sess. 142-43 (1793) (announcing the appointment of Robert Scott as Engraver of the Mint) (emphasis added); *see also* S. Journal, 4th Cong., 2d Sess. 216-17 (1796) (announcing the appointment of William Clark to an office "which became vacant during the recess of the Senate"). President Washington's publicly stated belief that these vacancies arose during the recess is far more persuasive than the Government's inchoate retracing of when those vacancies supposedly arose.[11]

3. The Clause's purpose supports this construction. Under the Government's

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[11] The Government likewise makes amorphous references to appointments by President Madison (and also by President Jefferson). Pet'n 25 & n.11. But President Madison never asserted the power to make recess appointments to preexisting vacancies, and it is unclear whether his appointments were to preexisting vacancies at all. *See* Rappaport, *supra*, at 1534-35 (disputing the Madison example); *see also id.* at 1529-34 (showing that Jefferson never made any such appointments).

interpretation, Presidents are free to avoid advice-and-consent by simply "wait[ing] for a 'recess' (however defined) and then fill[ing] up all vacancies." Pet.App. 37a. Such a practice would far outstrip the purpose of the Clause, which was to supply "an auxiliary method of appointment, in cases to which the general method was inadequate." *The Federalist No. 67*, *supra*, at 409. The "general method" is "inadequate" only when the vacancy arises during the Senate's absence. In that circumstance, there is no opportunity for the Senate to address the immediate vacancy. Should the vacancy arise before the Senate departs, however, no exigency would justify a recess appointment because the President has an opportunity to use the "general method" of appointment while the Senate is still in session.

The Government attempts to sidestep this reasoning by characterizing the "Clause's basic object" as "ensuring a genuine opportunity for vacancies to be filled, even if temporarily, at all times." Pet'n 25-26. The Government provides no authority for this supposedly "basic object," but, regardless, it is clear that the "happen during" construction does not disserve it. The Senate calendar is not etched in stone. Even if a vacancy arises just before the Senate's scheduled recess, the Senate is fully capable of staying in Session and confirming nominees. The President, moreover, could *require* the Senate to remain in Session by invoking his power to convene either House of Congress. *See* U.S. Const., art. II, § 3. If the vacancy is not important enough to fill on an expedited schedule, that simply proves the "general method" of Senate confirmation is adequate.

Finally, the Government attempts to invoke congressional acquiescence. Pet'n 28. Here again, the Government misreads the historical record. The 1863 statute the Government cites was a congressional attempt to *constrain* the President. It provided that no salary shall be paid to any recess appointee if the "vacancy existed while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate." Act of Feb. 9, 1863, 12 Stat. 646 (1863). Congress passed this statute just twelve days after the Senate Judiciary Committee issued a report forcefully rebutting the "happen to exist" construction, as well as affirming the (then-uncontroversial) intersession construction:

> When must the vacancy . . . and the appointment to which is thus found to terminate, accrue or spring into existence? . . . We think the language too clear to admit of reasonable doubt, and that . . . this period must have its inceptive point after one session has closed and before another session has begun.

S. Rep. No. 37-80, at 3 (1863). These actions are thus examples of Congress attempting to *defend* its prerogatives.

In any event, even if Congress had somehow acquiesced, such acquiescence would be irrelevant. "The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991). That is because the "structural principles secured by the separation of powers protect the individual." *Bond v. United*

States, 131 S. Ct. 2355, 2365 (2011). The Executive and Legislative Branches can no more bargain away the structural protections of the Constitution than they can bargain away the First Amendment. The court of appeals was thus correct to reject this supposed "acquiescence."

II. THE D.C. CIRCUIT'S JUDGMENT SHOULD ALSO BE AFFIRMED BECAUSE A THREE-DAY INTRASESSION BREAK IS NOT "THE RECESS."

The D.C. Circuit's invalidation of the President's "recess" appointments is also correct for another reason that the court did not address. In addition to violating the Clause's clear textual limitations, the January 4, 2012, appointments contravened longstanding executive practice recognizing that a break of less than three days is not "the Recess." At the time that the President made these appointments, the Senate had convened the day before to commence the Second Session of the 112th Congress, and convened again two days later. Given the Government's agreement that "the Executive has long understood that [three day] intra-session breaks . . . do not trigger the President's recess appointment authority," Pet'n 21, the January 4, 2012, appointments were invalid by any measure.

1. It appears that, since the founding, no President has previously attempted to make recess appointments during a break in the Senate's Session of less than three days. *See* Henry B. Hogue & Maureen Bearden, Cong. Research Serv., R42329, *Recess Appointments Made by President Barack Obama* 12 (2012). Such short breaks cannot possibly constitute "the Recess" within the meaning of the

Constitution. Otherwise, every weekend, night, or lunch break would be "the Recess" too—a construction that would upend the appointments process.

Attorney General Harry Daugherty articulated this limit in his opinion adopting the intrasession view for the first time, arguing that:

> If the President is empowered to make recess appointments during the present adjournment, does it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no. Under the Constitution neither house can adjourn for more than three days without the consent of the other. (Art. I, sec. 5, par. 4.) . . . [N]o one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned is taken.

33 Op. Att'y Gen. at 24-25.

As noted above, Presidents Reagan and Bush recognized the Senate's authority to preclude recess appointments by convening in pro forma sessions, as did President Obama at the beginning of his Administration. As the Administration told this Court: "[T]he Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007," Solicitor General Letter, *supra*, at 3, including during a period when it was convening pro forma sessions every three days. 153 Cong. Rec. S14609 (daily ed. Nov. 16, 2007) (Sen. Reid). Thus, until January 4, 2012, all Presidents to confront the issue had recognized that recess appointments are impermissible when the Senate is

convening pro forma sessions every three days.

2. The Government has argued that the Senate's sessions were constitutional nullities because "no business can be conducted" at those sessions. OLC Memo at 17. But that is not the President's decision to make. The Senate said it was convening in sessions and actually convened in such sessions. That is dispositive. Just as the Executive Branch cannot second-guess the Senate's method for determining whether it has a proper quorum, *United States v. Ballin*, 144 U.S. 1, 6 (1892), it cannot second-guess the Senate's representations about whether it is convening in a Senate session. *See, e.g.*, *id.* (each house of Congress determines when it "is in a condition to transact business"); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892) (attestations of "the two houses, through their presiding officers" are "sufficient evidence" that a bill "passed Congress"); Laurence H. Tribe, *American Constitutional Law* § 4-13 (2d ed. 1988) (on "matters of legislative self-governance . . . the Constitution expressly makes each house a law unto itself").

In any event, the Executive Branch's assertion that "no business can be conducted" at pro forma sessions is plainly wrong. "[A] pro forma session is not materially different from other Senate sessions," 158 Cong. Rec. S5954 (daily ed. Aug. 2, 2012) (citation omitted), and the Senate was clearly capable of doing business—and indeed, *actually did* do business—at these sessions. As noted above, the Senate passed the Temporary Payroll Tax Cut Continuation Act of 2011 during a pro forma session scheduled by the same adjournment order in effect on January 4, 2012. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011)

(passing H.R. 3765). Similarly, at an indistinguishable pro forma session in August of 2011, the Senate passed the Airport and Airway Extension Act of 2011. *See* 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011). And just one day before the "recess" appointments here, the Senate convened to commence the Second Session of the 112th Congress, 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012), as well as to discharge its obligation under the Twentieth Amendment to "assemble at least once in every year" in a meeting that "shall begin at noon on the 3d day of January." U.S. Const. amend. XX, § 2. In all of these instances, the Senate conclusively demonstrated its ability to do business at pro forma sessions.

The Senate could have likewise confirmed or rejected all pending nominations at any of those sessions. It merely needed to do so by unanimous consent—the procedure that the Senate uses to do most of its business, *see, e.g.*, 156 Cong. Rec. S7137-38 (daily ed. Sept. 15, 2010) (Sen. Coburn) (explaining as much), including confirming nominees, *see* Rybicki, *supra*, at 9. The Senate was fully capable of acting through the presiding Senator at any of the pro forma sessions because "the Senate operates on the absolute assumption that a quorum is always present until a point of no quorum is made." *See* Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Senate Precedents and Statistics* 1038 (1992). Indeed, on days when even the Government would concede that the Senate is in session, there are typically only a handful of senators on the floor, accompanied by a retinue of Senate staff. *See* Betsy Palmer, Cong. Research Serv., 96-452, *Voting and Quorum Procedures in the Senate* 1

(2010) (noting that it is "unusual for as many as 51 Senators to be present on the floor at the same time").

3. In short, the Senate convened regularly throughout the supposed "recess." It passed a bill, it commenced the Second Session of the 112th Congress, and it was fully available to confirm the President's nominees. For this reason, too, the so-called "recess" appointments were invalid.

III. ANY POSSIBLE DISRUPTION DUE TO THE D.C. CIRCUIT'S JUDGMENT IS LEGALLY IRRELEVANT AND LARGELY AVOIDABLE.

The Government also contends that the D.C. Circuit's decision "threatens a significant disruption of the federal government's operations." Pet'n 30. These concerns are largely overstated. As the court of appeals carefully explained, there are numerous steps Congress and the President could take to mitigate any consequences of enforcing the Constitution. Pet.App. 44a-46a.[12]

More importantly, though, to the extent that the D.C. Circuit's judgment would cause disruption, such disruption is both legally irrelevant and largely avoidable.

1. Foremost, any potential inefficiency from enforcing the Recess Appointments Clause is irrelevant. "The Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton v. City of N.Y.*, 524 U.S. 417, 449

[12] The Teamsters close their brief with a fusillade of attacks on Noel Canning, all apparently intended to undermine the D.C. Circuit's judgment. *See* Teamster's Br. 10. The Teamsters provide no citations to support these false assertions. All should be disregarded. *See* Resp. C.A. Br. 73-76.

(1998) (Kennedy, J., concurring). As this Court explained in *Chadha*, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." 462 U.S. at 944; *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010) ("[W]hile a government of 'opposite and rival interests' may sometimes inhibit the smooth functioning of administration, *The Federalist No. 51*, at 349, '[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.'" (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)).

In *Chadha*, like here, this Court confronted hundreds of instances over many decades in which the political branches had transgressed the Constitution's allocation of powers. The Court noted that the Government could offer numerous policy rationales to justify these transgressions, but it nonetheless held that "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised." 462 U.S. at 945. The same is true here.

2. Finally, to the extent that the Court is concerned about the consequences of enforcing the Clause's textual limitations, those consequences can be avoided by simply affirming the court of appeals on the narrowest ground the record presents. As explained above, the January 4, 2012, appointments were invalid for the additional reason that the President made them during the Senate's Session, at

a time when the Senate had not adjourned for more than three days. Because no President has ever before attempted intrasession recess appointments in those conditions, affirming the court of appeals on that basis would not call any appointments into question beyond those made on January 4, 2012.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted with the additional Question Presented proposed by Respondent.

Respectfully submitted,

GARY E. LOFLAND
HALVERSON NORTHWEST
LAW GROUP
405 E. Lincoln Ave.
Yakima, WA
Telephone: (509) 452-2828

LILY FU CLAFFEE
RACHEL L. BRAND
STEVEN P. LEHOTSKY
SHELDON GILBERT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Telephone: (202) 463-5337

NOEL J. FRANCISCO
Counsel of Record
G. ROGER KING
JAMES M. BURNHAM
JONES DAY
51 Louisiana Ave, N.W.
Washington, D.C. 20001
njfrancisco@jonesday.com
Telephone: (202) 879-3939

Counsel for Respondent

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RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner.

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia

BRIEF OF RESPONDENT NOEL CANNING

GARY E. LOFLAND
HALVERSON NORTHWEST
LAW GROUP
405 E. Lincoln Ave.
Yakima, WA
(509) 452-2828

LILY FU CLAFFEE
RACHEL L. BRAND
STEVEN P. LEHOTSKY
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

NOEL J. FRANCISCO
Counsel of Record
G. ROGER KING
JAMES M. BURNHAM
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
njfrancisco@jonesday.com
(202) 879-3939

Counsel for Respondent

QUESTIONS PRESENTED

The President purported to make three "recess" appointments to fill preexisting vacancies on the National Labor Relations Board on January 4, 2012, the day after the Senate convened to commence the Second Session of the 112th Congress, and two days before the Senate convened in another Senate session. The questions presented are therefore:

1. Whether the President's recess-appointment power may be exercised during a break that occurs during the Senate's Session, or is instead limited to "the Recess of the Senate" that occurs between each enumerated Session.

2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arise during that recess.

3. Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.

RULE 29.6 DISCLOSURE

Respondent Noel Canning is a division of The Noel Corporation. Noel Canning has no other parent corporations, and no other publicly held company has a 10% or greater ownership interest in Noel Canning. Noel Canning is engaged in the bottling and distribution of soft drinks in Central and Eastern Washington and Northern Oregon.

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INTRODUCTION

The framers believed the unilateral power to appoint officers was the most "powerful weapon of eighteenth century despotism." *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991). To cabin that power, they created an Appointments Clause that "bespeaks a principle of limitation," "dividing the power to appoint the principal federal officers . . . between the Executive and Legislative Branches." *Id.* at 884. This division ensures that both political branches must generally endorse senior officials before those officials may wield federal power. In doing so, it supplies "structural protection[] against abuse of power" that is "critical to preserving liberty." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).

The Recess Appointments Clause (the "Clause"), by contrast, was adopted without debate as a "supplement" to this power for "cases to which the general method was inadequate." *The Federalist No. 67*, at 409 (Hamilton) (Clinton Rossiter ed., 1961) ("*Federalist 67*"). When Senators dispersed by horseback across the nation after the Session each year, the Clause ensured that the President could fill unexpected vacancies with "temporary appointments . . . which should expire[] when the senate should have had an opportunity to act on the subject." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1551 (1833).

The Executive Branch (the "Executive") asks this Court to expand that subsidiary power to the point that it completely overwhelms the general. In this single case, it attempts to eradicate all meaningful limitations on the President's recess-appointment power, asserting authority to make recess

appointments: (1) *whenever* the President deems appropriate, so long as he believes there has been a "cessation" in the Senate Session (or, perhaps, a cessation exceeding three days); (2) to fill *whatever* office the President chooses, no matter how long vacant; and (3) *regardless* of whether the Senate is convening regularly. Taken together, the Executive's contentions yield a virtually unlimited unilateral appointments power.

The Constitution does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). It is inconceivable that this narrow "supplement" supplies the extravagant power the Executive now claims.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App. C, *infra*, 31a-41a.

STATEMENT OF THE CASE

On January 4, 2012, the President purported to "recess" appoint Sharon Block, Terence Flynn, and Richard Griffin to serve as Members of the National Labor Relations Board (the "Board"), even though (1) the Senate had convened the day before to commence the Second Session of the 112th Congress, (2) the Senate convened another session two days later, and (3) the vacancies to which these individuals were appointed arose prior to the supposed "recess" between those sessions. In so doing, the President, for the first time in history, attempted to make mid-Session "recess" appointments during a three-day break in Senate business.

1. Under 29 U.S.C. § 153(b), the Board must have a quorum of three lawfully appointed members. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010). Prior to January 3, 2012, the Board had two Senate-confirmed members and a third—Craig Becker—who had been "recess" appointed on March 27, 2010, during a 17-day mid-Session break, *see* 156 Cong. Rec. D355 (daily ed. Mar. 26, 2010). If valid, Becker's appointment expired by January 3, 2012, when the first Session of the 112th Congress concluded. *See* Art. II, § 2, cl. 3. By January 3, 2012, the Board undisputedly lacked a quorum.

2. At that time, the Senate was operating under a December 17, 2011, adjournment order.

> I ask unanimous consent that when the Senate completes its business today, it adjourn and convene for pro forma sessions only, with no business conducted on [December 20, December 23, December 27, December 30, January 3, January 6, January 10, January 13, January 17, and January 20] . . . and that following each pro forma session the Senate adjourn until the following pro forma session.

Pet.App.91a. Thereafter, the Senate convened short, formal sessions on the specified days, including one where it passed the Temporary Payroll Tax Cut Continuation Act of 2011 and did other Senate business, and another where it satisfied its constitutional obligation under the Twentieth Amendment to "meet[] . . . on the 3d day of January." U.S. Const. amend. XX, § 2.

Nevertheless, on January 4, 2012, the President unilaterally asserted that the Senate was in "recess" and proceeded to make the appointments at issue,

including for two nominees—Block and Griffin—whose nominations had been submitted to the Senate less than three weeks earlier and for whom committee questionnaires and background checks had not yet been submitted.[1] The next week, the Department of Justice's Office of Legal Counsel ("OLC") released a memorandum concluding that the President, in his "discretion," may determine that the Senate is in "the Recess" because it is unavailable to "'receive communications from the President or participate as a body in making appointments.'" *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. slip op. at 5 (Jan. 6, 2012) ("*OLC Memo*"). Key to this conclusion was OLC's assertion that pro forma sessions are constitutional nullities. *Id.* at 9.

3. Noel Canning is a family-owned soft drink bottling and distributing company in Yakima, Washington. In September 2011, an Administrative Law Judge ruled that it violated the National Labor Relations Act by refusing to execute a collective bargaining agreement it allegedly agreed to with Teamsters Local 760. Pet.App.2a. Noel Canning filed exceptions before the Board and briefing was completed on December 27, 2011, eight days before the "recess" appointments at issue. Resp. C.A. App. A3. The Board—in a panel featuring two of the "recess" appointees, Block and Flynn—issued its decision against Noel Canning on February 8, 2012,

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[1] *See* Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, *NLRB Recess Appointments Show Contempt for Small Businesses* (Jan. 4, 2012), http://www.help.senate.gov/newsroom/press/release/?id=170c9d76-0002-4a7d-b9b3-20185d847bbb.

after which Noel Canning promptly filed a Petition for Review in the United States Court of Appeals for the D.C. Circuit challenging the validity of the "recess" appointments. Pet.App.2a.

4. The parties proceeded to brief and argue in the court of appeals, with the Executive conceding at argument that, if the court "decide[s] that the Constitution gives the President this authority only in intersession," then "we lose." C.A.Tran. 45. Following argument, the court of appeals granted the Petition, holding that the January 4, 2012 appointments were invalid because (1) the Clause applies only to the break *between* the Senate's enumerated Sessions, and (2) the President may fill only those vacancies which arise during "the Recess." Pet.App.18a-52a. The panel did not address Noel Canning's separate argument that the recess appointments were also invalid because the Senate was convening "pro forma" sessions every three days.

SUMMARY OF ARGUMENT

"This Court has repeatedly emphasized that 'the Constitution diffuses power the better to secure liberty.'" *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (quoting *Morrison v. Olson*, 487 U.S. 654, 694 (1988)). This case confronts that separation's greatest threat: "a gradual concentration of the several powers in the same department." *The Federalist No. 51*, at 321 (Madison) (Clinton Rossiter ed., 1961).

Over time, the Executive has rejected each of the textual limitations on the Clause. Here, it requests not only judicial ratification of those prior erosions, but also an additional, extraordinary expansion of the recess-appointment power that would enable the

President to make recess appointments even when the Senate is actively meeting. This unprecedented assertion of presidential power should be rejected.

1. On the first question, the Clause empowers the President to fill vacancies "during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, Cl. 3. By linking "the Recess" to the "next Session," the Clause makes clear that the President may make unilateral appointments only during "the Recess" between enumerated Senate "Sessions."

The Executive, by contrast, seeks to give "the Recess" its colloquial meaning (every short break, rather than the formal, between-Session recess), while giving "next Session" its formal meaning (the enumerated Session, rather than every daily session). Executive Brief 7 n.3, 13 ("Br."). That makes no sense. The Clause is clear that "the Recess" and the "Session" are alternating states, as every executive or congressional official to construe the Clause prior to 1948 clearly recognized. If, as the Executive asserts, "the Recess" is the period between daily "sessions," then the "Session" should be the daily session between each "Recess." But since all agree that "next Session" refers to the formal Session, it follows that "the Recess" must likewise refer to the formal Recess. The Executive's schizophrenic construction serves no purpose other than to expand Executive power by increasing recess appointees' terms for up to a year.

2. On the second question, the Clause states that the President may make recess appointments only to fill "Vacancies that may happen during the Recess." Art. II, § 2, cl. 3. As the uniform understanding of this provision at the founding and for decades after

confirms, the text means what it says: The vacancy must "happen during"—*i.e.*, arise during—the Recess. The Executive claims that "may happen during" actually means "happen to exist," Br. 6, but that construction erases "may happen during" from the Clause, while contravening the uniform understanding of the framers.

3. The answer to the third question is also clear. The Executive agrees that Senate breaks "of three days or less 'during the Session of Congress,' . . . are effectively *de minimis* and do not trigger the President's recess-appointment authority." Br. 18. Here, however, the Senate convened sessions every three days throughout the supposed recess. It therefore was not in "the Recess of the Senate" under the Executive's own test. The Executive urges that the Senate's sessions—at which the Senate could and did conduct official business—were constitutional nullities, but the Senate, not the President, determines the Rules of its Proceedings. And here, it determined that it was in session every three days.

4. These limitations on the President's unilateral recess-appointment power accord with the Clause's limited purpose. As much as Presidents may desire an escape-hatch from Senate confirmation, the Constitution does not supply one. What the Constitution *does* provide is a "general method" of appointment with advice and consent, *Federalist 67*, at 409, that serves to "check" presidential power. *The Federalist No. 76*, at 457 (Hamilton) (Clinton Rossiter ed., 1961) ("*Federalist 76*"). The Clause also supplies an "auxiliary method," but limits it to making "temporary appointments" in certain circumstances during "'the recess of the Senate.'"

Federalist 67, at 409-10. It does not, as the Executive claims, provide presidential power to make two-year, unilateral appointments during every Senate break.

ARGUMENT

"The ordinary power of appointment is confided to the President and Senate *jointly*." *Federalist 67*, at 409-10. The Constitution's Appointments Clause thus provides that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.

Art. II, § 2, cl. 2. The Recess Appointments Clause then provides:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Id. § 2, cl. 3.

The framers discussed the Appointments Clause's advice-and-consent requirement extensively at the constitutional convention, debating "whether the [appointment] power should be vested in the entire legislature, as proposed in the original Virginia Plan; in the Senate alone; in the president alone; or in the president with the advice and consent of the Senate." Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* 16-17 (2000). Later, during ratification, Hamilton

vigorously defended the assignment of this power "to the President and Senate *jointly*," *Federalist 67*, at 409-10, explaining that it would impose "an excellent check upon a spirit of favoritism in the President." *Federalist 76*, at 457.

The Recess Appointments Clause, by contrast, was introduced at the end of the Convention and was adopted unanimously, without debate—treatment befitting its modest role. *See* James Madison, *Notes of Debates in the Federal Convention of 1787* (Sept. 7, 1787).[2] Hamilton later explained that this "auxiliary method of appointment" was necessary because the Senate could not be "continually in session for the appointment of officers, and as vacancies might happen *in their recess*," the "general method" of appointment would sometimes be "inadequate." *Federalist 67*, at 409-10. As Edmund Randolph, the nation's first Attorney General reasoned: The recess-appointment power "is to be considered as an exception to the general participation of the Senate" so "[i]t ought to[] be interpreted strictly." Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), *in* 24 *The Papers of Thomas Jefferson* 165, 166 (John Catanzariti et al. eds., 1990) ("Randolph Opinion").

The Constitution thus contains a primary mode of appointing officers (the Appointments Clause) and an "auxiliary"—*i.e.*, "subsidiary"[3]—method (the Recess Appointments Clause). These provisions supply "structural protections against abuse of power," which is the Constitution's principal means of

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[2] http://teachingamericanhistory.org/convention/debates/0907-2/.

[3] Noah Webster, *An American Dictionary of the English Language* 64 (3d ed. 1830).

"preserving liberty." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010).

Particularly against this backdrop, the Constitution's text, structure, and history repudiate the Executive's attempts to elevate the "auxiliary" appointments method over the "general" one for Presidents weary of compromising with the Senate.

I. The Recess-Appointment Power Is Limited To The Recess Between Senate Sessions.

Two possible constructions of the Clause are offered. The first is that "the Recess of the Senate" refers to the period between the Senate's enumerated "Sessions." The Executive's view, by contrast, is that "the Recess of the Senate" refers to every "period of cessation from usual work." Br. 7. The Executive's view is incorrect.

A. Text And Structure.

The Clause does not refer to "recesses" in a vacuum. Rather, it empowers Presidents to fill vacancies "during *the Recess of the Senate*, by granting Commissions which shall expire at the End of *their next Session*." Art. II, § 2, Cl. 3 (emphases added). The Clause thus ties "the Recess of the Senate" directly to "their next Session," establishing a dichotomy between the two. Recess appointments last until the end of the Senate's "next Session" because that "next Session" always comes right after "the Recess." The founding-era definition of "[s]ession" was, after all, "[t]he space for which an assembly sits, without intermission or recess." 2 Samuel Johnson, *Dictionary of the English Language* (1755).

The Clause's use of the definite article "the" confirms it has a specific sort of recess in mind—the class of formal recesses that correspond to the Senate's formal Sessions. There is only one "Recess of the Senate" per "Session." Had the Clause captured every generic "recess," the framers would have empowered Presidents "to fill up all Vacancies that may happen during *a* Recess of the Senate."[4] They did not. Instead, they tied "the Recess of the Senate" directly to the "next Session," making clear that these were alternating, mutually exclusive states. And because "the Session" plainly means enumerated Sessions, rather than every daily session—as the Executive notes, Br. 17, and as the Adjournments Clause's reference to adjournments "during the Session of Congress," Art. I, § 5, cl. 4, confirms—"the Recess of the Senate" likewise refers to the formal Recesses between enumerated Sessions.

The Executive disagrees, contending that "the Recess of the Senate" refers, not to the formal recess *between* formal Sessions, but to every colloquial "recess"—*i.e.*, each short cessation of work—occurring *throughout* each Session. Br. 13. Its construction, however, depends on giving the word "Session" conflicting meanings, both of which expand Executive power. On the one hand, the Executive claims that every "cessation from usual work" is "the Recess," Br. 13, such that the end of each daily or afternoon "Session" commences "the Recess of the Senate." On the other, the Executive claims that the "Session"

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[4] The Constitution's reference to appointing a President pro tempore "in the Absence of the Vice President," Art. I, § 3, cl. 5; Br. 16-17, is in accord. That "the" likewise refers to a specific class of Vice Presidential absences—absences from the Senate, as opposed to generic absences from any place.

demarcating how long recess appointees serve is the formal, enumerated Senate Session.[5] The Executive never addresses this inconsistency—wherein the recess-commencing "session" is different from the recess-appointment-terminating "session"—but it flows inevitably from its contention that Presidents can make recess appointments during every short break, which then last up to two years.

Indeed, if the Executive's colloquial construction were correct, it would make far more sense to give both "recess" and "session" their informal meanings, such that "the Recess" is the period that occurs between "sessions," and "the Session" is the period that occurs between "recesses." If read in isolation—as the Executive does with "recess"—the word "session" is just as susceptible of this informal construction as "recess," with early Congresses frequently calling daily or evening meetings a "session," often in conjunction with "recess." *See, e.g.*, 1 Reg. Deb. 738 (1825) ("[R]ecess till 6 o'clock. EVENING SESSION—6 o'clock."). This construction provides the Executive the emergency power it claims it needs, but any emergency appointments then expire following the next "period of usual work." Here, that was the Senate's January 6, 2012 daily session—long before the Board issued its decision. There is, however, *no* plausible basis for construing "the Recess" as referring to all colloquial recesses whereas the "next Session" refers solely to the Senate's formal, enumerated Session.

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[5] This is why the appointees here purported to serve two-year terms. *See* Br. 7 n.3; NLRB, *Board Members Since 1935* (appointees served until their successors were confirmed a Session-and-a-half later), http://www.nlrb.gov/who-we-are/board/board-members-1935.

Further illustrating the practical illogic of the Executive's construction, it means that mid-Session recess appointees serve twice as long as between-Session appointees. But there is no textual or historic justification for empowering Presidents to obtain double-length terms for certain recess appointees through strategic timing. Indeed, it is implausible that the Clause provides two-year terms to *any* recess appointees. Two years is half a presidential term, a full term for a member of the House, and nearly as long as most Senate-confirmed officers serve. *See, e.g.*, Matthew Dull & Patrick S. Roberts, *Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees*, 1989–2009, 39 PRES. STUD. Q. 432, 436 (2009) (Senate-confirmed officers in recent Administrations served for a median 2.5 years). The Executive provides no explanation for why mid-Session recess appointees should serve for as long as House Members. Nor could it, as recess appointments "should expire[] when the senate should have had an opportunity to act on the subject." 3 Story, *supra*, § 1551.

It is, moreover, inconceivable that the framers would have required the Senate-confirmation procedure of the "general" Appointments Clause if the recess-appointment power were as robust as the Executive claims. Were the President permitted to make two-year appointments during every "cessation from usual work," the recess-tail would not only wag the appointments-dog, it would completely devour the dog and render the advice-and-consent process a rarity for non-life-tenured positions. That expansion of "an exemption" beyond circumstances "plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the

announced will of the people." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

To avoid that facially absurd outcome, the Executive is forced to conjure a "de minimis" exception to its "plain meaning" construction that arbitrarily exempts mid-Session breaks of "three days or less." Br. 18. But the Executive does not even *pretend* to base this exception in law, citing merely its own "long" understanding to support it. *Id.*[6] And even that is inaccurate: three days is simply the latest dividing line the Executive has imagined to avoid midnight-appointment absurdity. *See infra* at 26-27. The Executive's need to adopt ever-changing "de minimis" exceptions confirms that its "plain meaning" argument is untenable. It also highlights the textual swamp into which the Executive seeks to send the judiciary—leaving courts to spend years deciding future disputes over how many days a break must last before it becomes "the Recess of the Senate."

Finally, the framers dispelled any lingering textual doubt by referring to "the Recess" rather than "an adjournment." The Constitution uses "adjourn" or "adjournment" in five other provisions. *See* Art. I, § 5, cl. 1; *id.* § 5, cl. 4; *id.* § 7, cl. 2; *id.* § 7, cl. 3, Art. II, § 3. Unlike "the Recess," the word "adjournment" *does* refer to short breaks between daily sessions: "AN adjournment is no more than a continuance of the session from one day to another, as the word itself signifies: and this is done by the authority of each house separately every day; and sometimes for a

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[6] Oddly, the Executive refuses to embrace the Adjournments Clause, which is the only principled basis for a "de minimis" exception. *See infra* at 49-50.

fortnight or a month together, as at Christmas or Easter." 1 William Blackstone, *Commentaries on the Laws of England* 179 (1st ed. 1765). The framers knew that the Senate would not work seven days a week and were capable of writing the every-cessation-from-usual-work provision the Executive requests—*i.e.*, one that applies during every "adjournment." They did not, instead confining the power to "the Recess of the Senate."[7]

B. Original Understanding.

Although the text is clear and therefore dispositive, the original understanding fully supports it. Every known executive and congressional discussion until 1948 recognized that "the Recess" and "the Session" were alternating states: the Senate cannot be in "the

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[7] The Executive argues that "'adjournment' typically referred to the act of adjourning, while 'recess' referred to the resulting *period* of cessation from work." Br. 17. But at the founding, the word "adjournment" meant both "[t]he act of adjourning" and "[t]he state of being adjourned." 1 *Oxford English Dictionary* 157 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (seventeenth century usage). For example, under the Articles of Confederation, "adjournment" referred to mid-Session breaks. *See, e.g.*, 27 Journals of the Continental Congress 576 (July 8, 1784) (report dispatches received "during the adjournment or sitting"); 7 Journals of the Continental Congress 168 (Feb. 27, 1777) (similar); 3 Journals of the Continental Congress 426-27 (Dec. 13, 1775) (similar); *see also, e.g.*, Letter from George Washington to John Jay (Sept. 2, 1787), *in* 3 *The Records of the Federal Convention of 1787*, at 76 (Max Farrand ed., 1911) ("during the adjournment of the Convention"); Luther Martin, *Genuine Information* (1787), *in* 3 *The Records of the Federal Convention of 1787*, *supra*, at 191 (similar), http://www.consource.org/document/luther-martin-genuine-information-1787-12-28/.

Recess" and "the Session" at the same time.[8] This understanding flows through the writings of the framers, countless Attorneys General, innumerable Senators, multiple founding-era commentators, and parallel founding-era provisions in the States. There is therefore no question that the Clause was long understood as limited to the formal Recess between enumerated Sessions.

1. Hamilton could hardly have been clearer in explaining that recess appointments "expire at the end of the ensuing session of the national Senate." *Federalist 67*, at 410. Given that the word "ensue" means "[t]o follow in a train of events" or "to come after,"[9] that explanation makes sense only if the "next Session" occurs immediately after "the Recess of the Senate." No "session of the national Senate" "comes after" a *mid*-Session break.

2. Every executive opinion on the recess-appointment power prior to the mid-twentieth century—beginning with the first two Attorneys General—likewise recognized that "the Recess" and "the Session" were mutually exclusive, such that "the Recess" falls between each "Session."

In the first opinion to interpret the Clause, Attorney General Randolph analyzed its operation for "a person appointed *during the Session* [who] shall not notify his refusal to accept, *until the recess*,"

[8] In 1948, the Comptroller General, with little analysis, asserted that appointments can be made mid-Session and then last up to two years. *See* 28 Comp. Gen. 121, 127 (1948). Twelve years later, the Executive Branch likewise began contending that "the Recess" can occur during "the Session." *See* 41 Op. Att'y Gen. 463, 471 (1960).

[9] Noah Webster, *An American Dictionary of the English Language* 301 (3d ed. 1830).

Randolph Opinion at 166 (emphases added), making clear that the two could not happen simultaneously.[10] Thirty years later, Attorney General William Wirt agreed, explaining that "the President shall have the power" to make recess appointments "to continue only until the Senate shall have passed upon it; or, in the language of the constitution, till the end of the next session." 1 Op. Att'y Gen. 631, 632 (1823). By conflating "the next session" with the Senate's first opportunity to "pass upon" an appointment, Wirt made clear that "the Recess" occurs only between "Sessions." Fifty years later, nothing had changed. *See* 16 Op. Att'y Gen. 522, 524 (1880) (Devens) (contrasting "vacancies which have occurred subsequently to the adjournment of the Senate" with vacancies that "existed during its session").[11]

Even when expanding the recess-appointment power, the Executive acknowledged this distinction. As the Executive notes, President Andrew Johnson made recess appointments during breaks in two enumerated sessions. Johnson's Attorney General, William Evarts, however, described these appointments as *between*-Session appointments rather than appointments *during* the Session. His opinions refer to the portion of the Session before the break as the "late session," thus suggesting that the portion of the Session after the break would

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[10] Same for President Washington's second Attorney General. *See To George Washington from Charles Lee*, 7 July 1796, Founders Online, National Archives (recess appointments last "until the end of the *next session after* the appointment" (emphasis added)).

[11] The Opinions over the intervening 50 years are in accord. *See, e.g.*, 2 Op. Att'y Gen. 336 (1830); 4 Op. Att'y Gen. 523, 527 (1846); 12 Op. Att'y Gen. 32, 38-39 (1866).

constitute "the next Session."[12] 12 Op. Att'y Gen. 469, 470 (1868); *see also* 12 Op. Att'y Gen. 449, 451 (1868) (similar); 12 Op. Att'y Gen. 455, 456 (1868) (similar). A district court that assessed one of those appointments likewise viewed them as between-Session appointments, explaining that the Senate's first meeting afterward was the "next Session" that terminated them (so long as the Senate had the formal ability to act on nominations). *See In re Dist. Att'y of U.S.*, 7 F. Cas. 731, 744 (E.D. Pa. 1868).

It is, therefore, no surprise that the first Executive opinion to directly consider mid-Session appointments rejected them. Attorney General Knox found it "irresistible" that the President cannot make recess appointments during mid-Session breaks. 23 Op. Att'y Gen. 599, 604 (1901). "[T]he phrase" in the Clause is "'*the* recess.'" *Id.* at 600. The "period following the final adjournment for the session" is "*the recess* during which the President has power to fill vacancies by granting commissions which shall expire at the end of the next session." *Id.* at 601. A mid-Session break, by contrast, "is not such recess, although it may be *a* recess in the general and ordinary use of that term." *Id.* "Congress 'adjourns' in either case, but in the one temporarily, so as merely to suspend an existing session for a short

[12] This understanding reflects the Senate's unique practice in that time. The year Johnson made his first appointments, the Senate took multiple "adjourned sessions." The meeting in July of 1867 was the "First adjourned session of the Fortieth Congress, commencing July 3d, 1867," 17 *J. Exec. Proceedings* 785 (1867), and the November meeting was the "Second adjourned session of the Fortieth Congress, commencing November 21, 1867." *Id.* at 859; *see also* Cong. Globe 40th Cong., 1st Sess. 753-54 (1867) (Howard and Nye referring to the 1867 meetings as separate sessions).

time; and in the other, finally, so as to terminate the existing session." *Id.*[13]

Not even Attorney General Daugherty, in the first opinion to approve mid-Session appointments, endorsed the Executive's current contention that "the Recess" can occur during "the Session." To the contrary, his opinion accords with General Evarts' opinions, suggesting that the period of Senate business following "the Recess" constitutes "their next Session." As he wrote: "Is the Senate in session? Then [the President] must make a nomination to that body," 33 Op. Att'y Gen. 20, 22 (1921) (quoting General Wirt), and "[i]f the Senate is not in session, the President fills the vacancy alone," *id.* at 23 (quoting General Stanberry).

3. Senators throughout the nineteenth century agreed. "The time of the Senate consists of two periods, *viz.*: their session and their recess." 26 Annals of Cong. 748 (1814) (Gore). A few other examples:

- In 1814, Senator Horsey: "If [] the occasion [to fill an office] arises *whilst the Senate are in session*, the office must be consummated by the concurrent act of the President and the Senate. If it arises *during the recess* of the Senate, it may be consummated by the act of the

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[13] General Knox also distinguished the nineteenth century Court of Claims decision the Executive invokes. Br. 23-24 (*Gould v. United States*, 19 Ct. Cl. 593, 595-96 (1884)). As Knox explained, that court had "in view the officer's right to receive pay rather than the power of the President," and, moreover, had "some residuum of doubt, for it expressly [held] that it is immaterial whether the claimant was legally in office or not." 23 Op. Att'y Gen. at 603.

President alone." 26 Annals of Cong. 712-13 (1814) (emphases added).

- Senator Clayton, a decade-and-a-half later, explained the "happen to exist" view (which he rejected) as: "[W]hen we . . . shall have *adjourned without day*, he may fill the vacancies then existing." 6 pt. 1 Cong. Deb. 239 (1830) (emphasis added).
- Following the Civil War, the Senate debated "happen during," yet nobody suggested the possibility of recess appointments during the Session. Rather: "[The vacancy] must happen between the moment of the adjournment of the Senate and the moment of the commencement of its next session." Cong. Globe, 39th Cong., 2d Sess. 407 (1867) (Howard).

Thus, when the Senate Judiciary Committee issued a Report protesting recess appointments to preexisting vacancies, it framed the question as: "When must the vacancy . . . and the appointment to which is thus found to terminate, accrue or spring into existence?" S. Rep. No. 37-80, at 3 (1863). The answer foreclosed mid-Session appointments: "[T]his period must have its inceptive point after one session has closed and before another session has begun." *Id.* Nobody disagreed.

4. Early commentators, too, shared this understanding. For example: "The appointments made, and commissions issued during the recess of the senate, are in force only till the end *of the ensuing session*." William Rawle, *A View of the Constitution of the United States* (2d ed. 1829), *reprinted in* 4 *The Founders' Constitution* 114, 115 (emphasis added). St. George Tucker likewise noted

that "the person appointed by [the President] during the recess of the senate would continue to hold his commission, until the end of their session: so that the vacancy would happen a second time during the recess of the senate." St. George Tucker, 4 *Blackstone's Commentaries* 342-43 (1803). Founding-era sources from England likewise make clear that "the Recess" cannot happen during "the Session." *See, e.g.*, 4 William Blackstone, *Commentaries on the Laws of England* 260 (1st ed. 1769) ("During the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward . . . . But in the court of the lord high steward, which is held in the recess of parliament . . . ."); John Wesley, *Free Thoughts on the Present State of Public Affairs* 26 (1770) (referring to "[t]he last recess of Parliament" and "the Session").

5. Finally, the Executive's position contravenes countless ratification-era provisions. As one commentator recently explained: "[I]n government practice the phrase 'the Recess' *always* referred to the gap between sessions."[14]

Under the Articles of Confederation, for example, "the recess" could not occur during "the Session." *See, e.g.*, 28 Journals of the Continental Congress 101, 104 (motion of James Madison, Feb. 25, 1785) (congressional secretary "shall attend Congress during their session, and in their recess the Committee of the States"). Nor did the Confederation

[14] Robert G. Natelson, *The Origins and Meaning of 'Vacancies that may happen during the Recess' in the Constitution's Recess Appointments Clause*, 37 Harvard J.L. & Pub. Pol'y (forthcoming 2014), at 19 ("Natelson"), http://ssrn.com/abstract=2257801.

Congress exercise the power to appoint a Committee of the States in "the recess," Br. 15, during its mid-Session breaks. *See, e.g.*, 25 Journals of the Continental Congress 803, 807 (22-day adjournment from November 4 to November 26) (1783); 27 Journals of the Continental Congress 706, 710 (18-day adjournment from December 24 to January 11) (1784-85). The only time it did so was *between* Sessions.[15]

The various pre-ratification state legislative practices the Executive invokes are in accord. Br. 15-16. In each of those examples, the relevant "recesses" occurred *between* separate legislative sessions or sittings. For example, in 1786, the Journal of the New Hampshire House of Representatives reported the reading of public letters "received in the recess of" the legislature. Br. 16. When the New Hampshire legislature reconvened, however, it was for a separate "Session begun and holden" on "the first day of February A.D. 1786." 20 *Early State Papers of New Hampshire* 488 (Albert Stillman Batchellor ed.,

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[15] The Executive disagrees, calling the Confederation Congress's recess "a scheduled intra-session recess." Br. 15. But that is misleading. The Articles provided that Congress would convene its new Session "on the first Monday in November," Articles of Confederation of 1777, art. V, para. 1. In the cited instance, Congress "adjourned" on June 3, 1784 "to meet at Trenton on the 30th day of October next"—a Saturday. 27 Journals of the Continental Congress 555-56. Congress did not reconvene until commencing its new Session on the following Monday—"the first Monday in November"—just as the Articles provided. *See id.* at 641. The five-month recess was, therefore, between separate Sessions, as the Confederation Congress plainly would have known from the outset. Further, the Committee of the States governed in Congress's absence and was therefore not a "legislative committee[]." Br. 15 n.7.

1891). Its "recess" had thus fallen between "Sessions."

The Vermont, Pennsylvania, and New Jersey examples are similar. The title page of the cited volume for Vermont, for example, refers to the "February, April and June Sessions, 1781,"[16] reflecting multiple sessions throughout the year. Pennsylvania's legislature, for its part, referred to the period ending in May as "the last sitting" and the period beginning in August as "this sitting."[17] New Jersey's legislature, too, sat for multiple formal "sittings" punctuated by recesses.[18] *See also* 2 *A Documentary History of the English Colonies in North America 1800* (Peter Force ed., 1839) (describing the new "meeting of a Provincial Congress" in New York following the recess).

Other legislatures similarly took between-Session recesses after adjourning to a date certain. That includes, for example, North Carolina[19] and

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[16] 1 *Journals and Proceedings of the General Assembly of the State of Vermont, reprinted in* 3 *State Papers of Vermont* (1924).

[17] Proceedings (Aug. 10, 1778), 1 *Journal of the House of Representatives of the Commonwealth of Pennsylvania* 213, 214 (John Dunlap ed., 1782).

[18] *See Votes and Proceedings of the Fifth General Assembly of the State of New Jersey*, 5th Sess., 1st Sitting 1 (1780); *id.*, 5th Sess., 2d Sitting 1; *id.*, 5th Sess., 3d Sitting 1.

[19] Pet.App.21-a-22a; 16 *The State Records of North Carolina* 177 (Walter Clark ed., 1895) (1782-83 sessions) ("The business of the Session being ended . . the House Adjourned till the first Monday in November next.").

Massachusetts.[20] Similar founding-era examples abound. *See* Natelson at 20-35.

C. Historical Practice.

Historical practice, too, overwhelmingly refutes the Executive's position.

Over the 133 years before General Daugherty's opinion, there were thousands of periods of "cessation from usual work," Br. 7, during the Senate's Sessions. *See generally* S. Pub. 112-12, *Official Congressional Directory, 112th Congress* (2011) ("Congressional Directory").[21] At least 62 of these mid-Session breaks exceeded three days. *See id.* at 522-27. Yet over this lengthy period, the only appointments made before adjournment *sine die* were Andrew Johnson's ambiguous appointments. *Supra* at 17-18. None of the other 27 Presidents who served from 1789 until 1921 even attempted to exercise this supposed "power," strongly suggesting its "assumed *absence*." *Printz v. United States*, 521 U.S. 898, 908 (1997).

For example, in three of the four years Abraham Lincoln was President, the Senate took mid-Session breaks exceeding three days (1862-63, 1863-64, and 1864-65), in addition to hundreds of shorter ones. *See* Congressional Directory at 525. Despite (1) those many supposed opportunities to make recess appointments; (2) the fact that he was presiding over the Civil War; and (3) his expansive view of executive power—President Lincoln never attempted to make recess appointments during these breaks.

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[20] *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1552-53 (2004-2005) ("Rappaport").

[21] http://www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf.

The Executive's contrary suggestion that President Lincoln "appears" to have made mid-Session recess appointments of Brigadier Generals is incorrect. Br. 22 & n.15. The letters the Executive invokes were not recess appointments but, rather, acting appointments "carried unofficially . . . pending the legal outcome of confirmation." John H. Eicher & David H. Eicher, *Civil War High Commands* 31 (2001) (providing sample appointment letter). That is why each letter explains that "[s]hould the Senate, at their next session, advise and consent thereto, you will be commissioned accordingly,"[22] whereas recess appointments are conferred "by granting Commissions." Art. II, § 2, cl. 3; *see also* Cong. Globe, 37th Cong., 3d Sess. 565 (1863) (Wilson) ("[A] very large portion of these general officers have received letters of appointment, not commissions."). That is also undoubtedly why a "similarly phrased appointment" was issued "while the Senate was in session." Br. 22 n.15.

D. The Executive's Contrary Arguments.

The Executive's principal argument—that the Constitution's meaning has changed because of Senate acquiescence—is incorrect. So too are its various historical arguments.

1. The Executive argues that "the authority to make intra-session recess appointments has been accepted by both political branches for nearly a century." Br. 20. Even if true, that would be

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[22] *E.g.*, Appointment Letter of Thomas G. Stevenson, Dec. 24, 1862, 6 Letters of Army Appointments 1829-1945, at 224 (Entry 314), Records of the Adjutant General's Office, 1762-1984, Record Group 94 (RG 94), National Archives Building (NAB), Washington, D.C.

irrelevant given the clarity of the text and original understanding. Whatever the "perceived necessity" of the moment, licensing "extraconstitutional government . . . would, in the long run, be far worse." *New York v. United States*, 505 U.S. 144, 187-88 (1992). The "separation of powers protect[s] the individual," *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011), and the political branches can no more bargain it away than they can abandon the Bill of Rights.

But regardless, this "authority" has not been "accepted" for past 100 years. The Executive's current position is simply the latest in a string of increasingly aggressive assertions of mid-Session recess-appointment power. Because the Executive's position has consistently evolved, there has not even been an opportunity to acquiesce.

a. In 1921, Attorney General Daugherty rejected the Executive's construction. In his view, an "adjournment for 5 or even 10 days" cannot "be said to constitute the recess intended by the Constitution." 33 Op. Att'y Gen. 20, 25. It needed to be "impossible" to obtain advice and consent before recess appointments were permitted. *Id.* That view prevailed for the next 72 years. *See, e.g.*, 3 Op. O.L.C. 314, 315-16 (1979); 6 Op. O.L.C. 134, 149 (1982); 13 Op. O.L.C. 271, 273 n.2 (1989); 16 Op. O.L.C. 15, 15 (1992) (noting "[t]he longstanding view . . . that the term 'recess' includes intrasession recesses if they are of substantial length").

The Executive began changing course in a 1993 district court filing. *See, e.g.*, Defs.' Mot. S.J. Count II Am. Compl. 14-18, *Mackie v. Clinton*, No. 1:93-cv-00032-LFO, June 21, 1993, ECF No. 30 ("[T]here is

no lower time limit that a recess must meet."). Shortly thereafter, it disparaged General "Daugherty's caution" as non-binding "dictum," and began asserting "that 'recess appointments during a 10-day intrasession recess would be constitutionally defensible.'" *OLC Memo* at 9 n.13 (quoting Memorandum for John M. Quinn, Counsel to the President, from Walter Dellinger, Ass't Att'y Gen., O.L.C., *Re: Recess Appointments* (May 29, 1996) ("Quinn Memo")). But even then, the Executive did not contend that "the Recess of the Senate" exists during *any* "period of cessation from usual work," subject to a nebulous "de minimis" exception. Br. 18. That sweeping position appears to have been minted in this litigation. *Id.*

b. Nor can the Executive take refuge in post-1921 practice generally. Mid-Session appointments did not become common until the late 1970s and, even then, there was consistent congressional resistance.

After General Daugherty's opinion, Presidents Harding, Coolidge, Hoover, and Franklin Roosevelt collectively made just 22 mid-Session appointments. Br. 9a-12a. And even after President Truman made many more, President Lyndon Johnson refused to make any despite the Senate's taking 12 mid-Session breaks exceeding three days, Congressional Directory at 529, as did President Ford despite 16 such breaks, *id.* at 529-30. The practice of those Presidents is particularly telling, given Johnson's prior service as Senate Majority Leader and Ford's as House Minority Leader.

The end of the Carter Administration appears to mark the beginning of mid-Session recess appointments "expressly to avoid the Senate's advice

and consent," Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2213 (1993-1994), when President Carter purported to recess appoint John McGarry to the Federal Election Commission after the Senate twice failed to confirm him. *See* Sara Fitzgerald, *The Price of Being Tip O'Neill's Friend*, Nat'l J., Nov. 4, 1978, at 1786. The practice then "grew dramatically under President Ronald Reagan." *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 240 (3d Cir. 2013).

Both before and after this escalation, the Senate resisted. To be sure, it did not shut down the government or demand impeachment. But it did take numerous steps demonstrating its refusal to acquiesce in the President's ever-expanding conception of the Clause.

For example, Congress amended the Pay Act in 1940 to permit paying recess appointees who fill preexisting vacancies in only three circumstances, each linked directly to "the termination of the session of the Senate." 54 Stat. 751.[23] These amendments—each of which turns on the "termination of the session of the Senate"—would have made little sense if Congress had meant to endorse recess appointments *during* the Session.[24]

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[23] The materially identical modern Pay Act is codified at 5 U.S.C. § 5503.

[24] The Executive, however, promptly interpreted Congress's limitations into irrelevance. In a single Memorandum, the Executive adopted contradictory constructions of the same language in the Clause and the Act. The Executive—purporting to partially channel the Comptroller General—(1) interpreted "their next Session" in the Clause as referring solely to formal Sessions, (2) interpreted "termination of the session" in the Pay

Senators also forcefully pushed back in other ways as Presidents became increasingly aggressive in making mid-Session recess appointments. For example, in 1984, when President Reagan made a mid-Session appointment to the Federal Reserve Board, Senator Sarbanes objected that the appointment was "a stretching of the recess appointment power beyond constitutionally permissible limits." 130 Cong. Rec. 22768 (Aug. 8, 1984). The next day, Senator Byrd introduced a resolution "[s]upported by a large number of [his] colleagues" which urged "that recess appointments be avoided except where there has been a formal termination of a session of the Senate or where the Senate will be in recess for longer than 30 days." *Id.* at 23234 (Aug. 9, 1984).

Three years later, Senator Byrd upped the ante, threatening to "'have pro forma sessions'" to block recess appointments. John Hanrahan, *Washington News*, U.P.I. (Oct. 7, 1987). And toward the end of the Clinton Administration, Senator Inhofe "vowed to hold up [ ] nominations" unless "the White House agreed to strict limitations on the use of a constitutional device allowing appointments to be made during Congressional recesses." Philip Shenon, *In Protest, Senator Blocks All Nominations*, N.Y. Times, June 9, 1999.

(continued...)

Act to mean temporarily entering any break throughout the formal Session, and (3) concluded that "'commencement of the next succeeding session of the Senate'" in the Pay Act refers "to the reconvening of the Senate after any adjournment" during its formal Session. 41 Op. Att'y Gen. at 469-77.

The Senate has continued to resist aggressive mid-Session appointments in the past decade. When President Bush made a mid-Session recess appointment of John Bolton as his envoy to the United Nations, Senator Lautenberg called it an example of a President who "'bends the rules and circumvents the will of Congress.'" Elisabeth Bumiller & Sheryl Stolberg, *Bush Appoints Bolton as U.N. Envoy, Bypassing Senate*, N.Y. Times, Aug. 1, 2005. The Senate soon thereafter began using "pro forma" sessions to resist further encroachment. *See, e.g.*, 153 Cong. Rec. S14,609 (daily ed. Nov. 16, 2007) ("pro forma sessions during the Thanksgiving holiday to prevent recess appointments") (Reid). And following President Bush's mid-Session appointment of Judge William Pryor, Senator Kennedy filed amicus briefs in the Eleventh Circuit and this Court (authored by Professors Lawrence Tribe and Martin Lederman) arguing that "[t]he text, structure, purpose, function, and pre-1921 history of the Recess Appointments Clause all confirm Attorney General Knox's 'irresistible' conclusion that the President may not make recess appointments during intra-session Senate breaks." Reply Br. Amicus Curiae Sen. Edward M. Kennedy, *Stephens v. Evans*, No. 02-16424, at 8 (11th Cir. Aug. 24, 2004), 2004 WL 3589829, at *8.

2. The Executive's remaining historical arguments are equally mistaken. The Executive claims that "the phrase 'the recess' was, by 1787, regularly used to describe the equivalent of intra-session breaks." Br. 7. That is incorrect. *See supra* at 15-24. Its smattering of additional evidence—from English Parliament and an irrelevant Senate report—only undermine its position.

a. Ratification-era parliamentary practice confirms that "the Recess" and "the Session" were mutually exclusive.

Parliament had "three types of breaks in legislative proceedings": (1) "an adjournment," which "was a break in the business of a house that occurred during the legislative session" and which "was called by a house and could be of extremely short duration"; (2) "a prorogation," which "was an order by the King that would end the session for both houses," to "eventually be followed by a new session"; and (3) "a dissolution," which "would end the Parliament and require elections for a new Parliament," and could be ordered by the King or occurred after seven years. *Rappaport* at 1550-51 (citing sources).

The framers adapted these practices for republican government. That meant retaining "adjournments" (which remained under the control of the legislature), eliminating the executive's role from dissolution (by creating terms of office and biennial elections), and eliminating prorogations by the monarch—shifting the power to terminate the Session to Congress itself. *Id.* at 1551. The framers did not use the term "prorogue," however, instead using "recess" to "refer to breaks between sessions," consistent with usage under the Articles of Confederation and in state practice. *See supra* at 21-24. Using "the Recess" to describe the break following termination of "the Session" thus evolved logically from parliamentary practice.

The Executive's only counter-evidence is two stray instances in the 1600s ostensibly describing a mid-Session break as a "recess." Br. 14. But two colloquial references to "recesses" 150 years before

ratification are obviously less probative than Parliament's formal procedures in the late 18th century.

b. The Executive also erroneously claims that a 1905 Senate Committee Report endorsed its every-break construction. Br. 24-25. In fact, the 1905 Report rejects the Executive's position: "The theory of 'constructive recess' constitutes a heavy draft upon the imagination, for it involves a constructive *ending of one* session, a constructive *beginning of another*, and a constructive recess *between the two*." S. Rep. No. 58-4389, at 3 (1905), *reprinted in* 39 Cong. Rec. 3823, 3824 (emphases added). The Report never acknowledges the possibility of recesses during the Session.

Moreover, the Senate issued its Report to protest recess appointments during a supposed between-Session recess lasting less than a second. *See, e.g.*, Vivian S. Chu, Cong. Research Serv., RL33009, *Recess Appointments: A Legal Overview* 8 (2011). No President had previously asserted the power to make mid-Session recess appointments, with Attorney General Knox rejecting it four years earlier, explaining that a mid-Session break is not "*the* Recess." 23 Op. Att'y Gen. at 601. The Committee plainly was not endorsing a power the Executive had just rejected.

II. The Recess-Appointment Power Is Limited To Filling Vacancies That "Happen During" The Recess.

The Clause empowers the President to "fill up all Vacancies that may happen during the Recess." Art. II, § 2, cl. 3. There is no serious question that this text was originally understood to authorize a

unilateral appointment only where the vacancy arises during the Recess. Every known analysis prior to 1822 reaches that conclusion, as does every analysis by a neutral arbiter (including three courts) prior to the 1880s. By contrast, the Executive's claim that Presidents may use recess appointments to fill all "vacancies that *exist*," Br. 8, "require[s] a total perversion of the language used." *People ex rel. Ewing v. Forquer*, 1 Ill. 104, 107 (1825).

A. Text And Structure.

No English speaker would use the words the Constitution uses to describe an appointments power extending to all extant vacancies, whenever they first arose. The Clause empowers the President to "fill up all Vacancies that may happen during the Recess." Art. II, § 2, cl. 3. In 1789, "happen" was—as it still is—a verb that expresses the sudden occurrence of an event. *See, e.g.*, 1 Samuel Johnson, *Dictionary of the English Language* (1755) ("[h]appen" means "[t]o fall out; to chance: to come to pass"); Natelson at 36-37 (similar definitions). Similarly, the word "may" meant "[t]o be by chance." 2 Samuel Johnson, *supra* at 1273. These words make clear that the Clause authorizes recess appointments only to "fill up all Vacancies that [by chance come to pass] during the Recess of the Senate."

The original Senate Vacancies Clause contains similar language: "[I]f Vacancies *happen by Resignation, or otherwise, during the Recess* of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." Art. I, § 3, cl. 2 (emphasis added). By describing *how* vacancies "happen"—"by Resignation

or otherwise"—this provision reinforces the inference that vacancies "happen" *when* they arise. *See* Rappaport at 1505; Natelson at 41-45 (additional examples).

That is why, in 1794, the Senate refused to seat a would-be Senator appointed to fill a vacancy that preexisted the legislature's recess. *See* 4 Annals of Cong. 77-78 (1794). The phrase "happen during the Recess" does not mean different things in different provisions.

The Executive disagrees, contending that "[a] vacancy is not just an event of an instant," but rather "was understood as a continuing 'state.'" Br. 29-30. But that proposition only refutes the Executive's construction. The potential breadth of "vacancy" is *why* the framers specified that the vacancy must "happen during the Recess." "A vacancy that happens during a recess is not the same as an office that happens to be vacant." David P. Currie, *The Constitution in Congress: The Jeffersonians 1801-1829*, at 188 (2001).

The Executive also attempts to conflate a passive condition (vacancy) with an active, ongoing event (World War II). Br. 30. But the two are plainly different. Events like wars "happen" every day they continue; soldiers are shooting as much on day 100 as on day one. Vacancy, by contrast is a passive status—like death—that "happens" just once on the day it arises and then continues. It would be nonsensical to say that someone's death in 1939 "happened during" the 1940s, even though the person's "state of [death] persists." *Id.*

But regardless, the most basic impediment to the Executive's construction is that, as this Court has

long recognized, "[i]t cannot be presumed[] that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it." *Marbury v. Madison*, 5 U.S. 137, 174 (1803). Had the Clause authorized unilateral appointments to fill all "vacancies that *exist* during the recess," Br. 8, it would be written this way: "The President shall have Power to fill up all Vacancies ~~that may happen~~ during the Recess of the Senate." That phrasing would accomplish precisely what the Executive seeks with greater economy of words. If "may happen during" just means "happens to exist during," then the extra words supply nothing but ambiguity.

The Executive counters that the true purpose of "that may happen" is to prevent Presidents from filling "a known future vacancy" during the Recess. Br. 31. But a "known future vacancy" is not an *actual* "vacancy" that may be "fill[ed] . . . during the Recess." Absent a current vacancy, there would be nothing to "fill," so it never would have dawned on anyone to insert "that may happen" to prevent some future Executive from adopting an implausible interpretation. The Clause could be interpreted to include "known future vacancies" only after adding extra words that fundamentally change the meaning—*i.e.*, the sorts of textual contortions the Executive deploys here.[25] In any event, the Executive's construction does not even avoid the supposed textual problem it identifies. The Clause could just as easily "be thought to permit" filling

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[25] That the Appointments Clause is sometimes used to fill future vacancies, Br. 31 n.21, accords with that provision, which speaks not of "vacancies" but of "appointments."

"known future vacancies" that "exist" during the Recess, as ones that "arise."[26]

B. Original Understanding And Historical Practice.

The historical record further refutes the Executive's view. The Nation's first four Presidents understood the Clause's textual limitations, as did the Senate and numerous courts until the late nineteenth century. The Executive Branch's inconsistent and self-serving departure decades after ratification cannot alter the Constitution's balance of power.

1. Although some Presidents resented the Clause's restrictions, for over three decades, the Executive Branch consistently agreed that the Clause was limited to those vacancies that arise during the recess.

a. Washington. Edmund Randolph, the nation's first Attorney General and a leading member of the constitutional convention, articulated the founding-era view in the first opinion to interpret the Clause. General Randolph framed the question as whether there was "a vacancy which has *happened* during the recess of the Senate?" *Randolph Opinion* at 166. There was not, he explained, because "[i]t is now the same and no other vacancy, than that, which

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[26] The Executive no longer claims that if "that may happen" modifies "vacancies," then "it would not limit the *time* when the President may exercise" the recess-appointment power, such that "the President would retain his power to fill a vacancy that arose during a recess even after the Senate returned." Pet'n 27. And for good reason. The word "during" limits both the time when that Power exists ("the Recess of the Senate") and the types of vacancies it can be used to fill (those which "happen during the Recess").

existed [on a date during the Session.] It commenced therefore on that day or may be said to have *happened* on that day." *Id.*; *see also* To George Washington from Charles Lee, 7 July 1796, Founders Online, National Archives (similar opinion by Washington's second Attorney General, Charles Lee).[27]

Washington, moreover, regularly followed a procedure in which he would nominate someone without their consent and obtain that person's confirmation before the Recess. *See* Rappaport at 1522. If the person subsequently declined the commission, Washington would treat the ensuing vacancy as one which "happened" during the recess. *Id.* Had President Washington "understood the word 'happen' to mean 'happen to exist,' this convoluted process would have been unnecessary." Pet.App.39a.

b. Adams. The Adams Administration shared this view. To be sure, President Adams resented the Clause's limits. But as the Executive concedes, he never violated them, no doubt because everyone he consulted understood that vacancies had to arise during the recess.

Adams's query began with his Secretary of War, James McHenry, who solicited Hamilton's views: "It would seem, that under this Constitutional power, the President cannot alone make certain appointments or fill up vacancies that may happen during a session of the senate." Letter from James McHenry to Alexander Hamilton (Apr. 26, 1799), *in* 23 *The Papers of Alexander Hamilton* 69, 70 (Harold C. Syrett ed., 1976). Hamilton agreed: "It is clear,

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[27] http://founders.archives.gov/documents/Washington/99-01-02-00702.

that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate." Letter from Alexander Hamilton to James McHenry (May 3, 1799), *in* 23 *The Papers of Alexander Hamilton*, *supra*, at 94. Attorney General Lee, held over from Washington, likewise affirmed that "an office created during the session of the Senate . . . [was] a vacancy happening during the session, which the President cannot fill, during the recess . . . ." Letter from John Adams to J. McHenry (May 16, 1799), *in* 8 *The Works of John Adams* 647, 647 n.1 (Charles Francis Adams ed., 1853).

c. Jefferson. Thomas Jefferson, too, begrudgingly agreed. Shortly before becoming President, Jefferson wrote a letter to James Monroe lamenting that he had "reason to expect in the outset the greatest difficulties as to nominations." Letter from Thomas Jefferson to James Monroe (Feb. 15, 1801), *in* 9 *The Works of Thomas Jefferson* 178, 179 (Paul Leichester Ford ed., 1905). "The late incumbents running away from their offices & leaving them vacant[] will prevent my filling them without the *previous* advice of the Senate." *Id.* Or as he later remarked: "I shall be embarrassed by finding the offices vacant, which cannot be even temporarily filled *but with advice of Senate* . . . ." Letter from Thomas Jefferson to Tench Coxe (Feb. 11, 1801), *in* 3 *Memoirs, Correspondence, and Private Papers of Thomas Jefferson* 459, 459 (1829) (emphasis added).[28]

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[28] The letters the Executive invokes simply highlight Jefferson's frustration with the Clause's limitations. Br. 41-42. Tellingly, however, Jefferson never adopted the Executive's construction, instead recognizing that the Clause must be construed to

d. Madison. Madison also agreed. For example, after the United States won the War of 1812, he sought to reward General Andrew Jackson for his victory at the Battle of New Orleans. Madison could not issue a promotion during the Senate's recess, however, because the generalship he sought to give Jackson had become vacant during the Session. Madison's Secretary of War thus informed Jackson that "[t]he vacancy produced by General Hampton's resignation not having been filled during the late session of the Senate, cannot be supplied constitutionally during the recess of that body." *James Madison: Paper on relations with Andrew Jackson, December 1823*, Founders Online, National Archives.[29]

e. Not until three decades after ratification, in 1823, did Attorney General William Wirt (who did not participate in the Constitutional Convention) deviate from this interpretation. Even then, however, he acknowledged that "[t]he most natural sense of [happen] is 'to chance—to fall out—to take place by accident.'" 1 Op. Att'y Gen. at 631. That undoubtedly explains why subsequent Attorneys General reverted back to the Washington-Jefferson-Adams-Madison position, *see* 4 Op. Att'y Gen. 361, 363 (1845) (Mason) ("[i]f vacancies are known to exist during the session of the Senate, and

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(continued...)

"restrain the Executive within limits which might admit mischief." Letter to Wilson Cary Nicholas (Jan. 26, 1802), *in* 36 *The Papers of Thomas Jefferson* 433, 433 (Barbara B. Oberg ed., 2009).

[29] http://founders.archives.gov/documents/Madison/99-02-02-0103.

nominations are not then made, they cannot be filled by executive appointments in the recess of the Senate"), and, *even when* they followed the Wirt opinion, questioned its soundness, *see* 10 Op. Att'y Gen. 356, 356 (1862) (Bates) (advising that, but for prior broad constructions, there would be "serious doubts" about the every-vacancy construction).

2. The contemporaneous views of the Senate likewise confirm that "may happen during the Recess" was understood to encompass only those vacancies that arise during the Recess.

Justice Story has recounted the Senate's understanding that the Clause describes "vacancies occurring from death, resignation, promotion, or removal." 3 Story, *supra*, § 1553. As he explained, if "offices are created by law" but not "filled" during the Session, the President "cannot appoint to such offices during the recess of the senate, because the vacancy does not happen during the recess of the senate." *Id.*; *see also* Thomas Sergeant, *Constitutional Law* 361 (1822) (similar).

And the Senate did, indeed, believe that "[i]f the vacancy happened at another time, it is not the case described by the Constitution." 26 Annals of Cong. 653 (1814) (Gore). For example, in 1822, the Senate Committee on Military Affairs issued a report explaining that the President cannot fill vacant military offices created during the Session "because the vacancies did not *happen* in the recess of the Senate." 38 Annals of Cong. 500 (1822). Five years later, Senator Chambers warned that "if the President does, by war, acquire a right to fill vacancies to offices which do not 'happen' in the recess, I would not give the snap of my finger for your

liberties." 5 Cong. Deb. 89 (1829). And the following year, Senator John Clayton noted that "[i]t has never been pretended that the President alone could fill, by one of these temporary appointments, a vacancy happening during the session." 6 pt. 1 Cong. Deb. 240 (1830).

Even during the Civil War, the Senate stuck to this position. In 1863, the Senate Judiciary Committee issued a 12-page report analyzing whether a vacancy may "begin during the session of the Senate, or must it have its beginning during the recess?" S. Rep. No. 37-80, at 3. The Committee thought "the language too clear to admit of reasonable doubt" that "this period must have its inceptive point after one session has closed and before another session has begun." *Id.* As for General Wirt's opinion, the Committee was "unable to see its correctness, or to concur in its conclusion," rejecting "the artificial interpretation he gives to the language." *Id.* at 4. "To say that an event which is to 'happen' during a given period of time may logically be an event which does not happen during that period, but during another and an anterior period, seems to us to be a perversion of language." *Id.* at 5.[30]

3. All three courts to interpret the text prior to 1880 agreed. In 1825, the Supreme Court of Illinois interpreted similar language in an Illinois law,

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[30] The Executive makes much of President Lincoln's "recess appointment of David Davis as a Justice on this Court." Br. 35. But tellingly, Lincoln did not inform Congress about it, *see* S. Exec. Journal, 37th Cong., 3d Sess. 127 (1863), an omission inconsistent with contemporaneous nominations which *did* note that the nominees "were commissioned during the recess of the Senate," *id.* Further, Davis did not actually take his seat until after he was confirmed. *See* 7 F. Cas. at 739.

concluding: "The words [ ] of this section, appear so clear, and so devoid of ambiguity, that it seems a useless waste of time to look further than to the clause itself, for its true meaning." *Forquer*, 1 Ill. at 107. In 1868, the Eastern District of Pennsylvania, in the first federal opinion construing the Clause, held that the Executive's "construction is not conformable to either the literal or the ordinary import of the words 'may happen.'" *In re Dist. Att'y*, 7 F. Cas. at 735. "[T]he existence of the power in question has not been legislatively recognised, has been denied by the senate, has been practically asserted by presidents only, and has not been exercised without constantly recurring suggestions by [those presidents] of doubts of its existence under the constitution: opinions of attorney-generals have been its only support; and in these opinions, other jurists of eminence have not concurred." *Id.* at 744. One year later, the Eastern District of Arkansas agreed, holding that an office "created by an act of congress two years prior to his appointment . . . may have existed, but did not happen, during the recess of the senate." *Schenck v. Peay*, 21 F. Cas. 672, 674 (C.C.E.D. Ark. 1869).

4. Finally, "scores of Founding-Era legal materials" provide "illustrations of what it meant for a vacancy to 'happen,'" all of which referred to "discrete events" and "none" to "continuance of a pre-existing vacancy." Natelson at 42-47 (citing examples). For example, in the late 1770s, Thomas Jefferson introduced Virginia legislation providing that members of a "Board of War" "may be removed . . . by joint vote of both Houses, and thereupon, as also on the death, resignation or refusal to act, of any member, they shall proceed to

chuse another." *A Bill Establishing a Board of War*, 18 June 1779, Founders Online, National Archives.[31] The bill provided that "if either of these events happen during the recess of Assembly, the Governor and Council may appoint some person to act in the said office until the end of the next session of Assembly." *Id.* By enumerating "death, resignation or refusal to act" as things which "happen during the recess," Jefferson's bill confirms that vacancies "happen" when they arise.

C. The Executive's Contrary Arguments.

Here too, the Executive's historical arguments fail, as does its contention that, regardless of what the Clause was originally supposed to mean, longstanding practice and purported acquiescence have changed that meaning.

1. The Executive's principal historical argument is that, while Presidents Washington, Adams, Jefferson, and Madison publicly adhered to the "arise" interpretation, they secretly believed it was wrong and occasionally acted accordingly. To this end, the Executive purports to have unearthed a handful of appointments to vacancies which supposedly arose while the Senate was in session. Br. 65a-89a. This effort fails.

Foremost, the Executive does not dispute that all four of these Presidents publicly adhered to the "arise" interpretation. Its evidence, rather, consists of inchoate retracing of ancient vacancies and appointments, unaccompanied by contemporaneous explanation. That cannot overcome the evidence that all founding-era analysts—attorneys general,

[31] http://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0008.

framers, senators, and commentators—agreed that vacancies must arise during "the Recess." As an 1822 Senate Report explained: "[N]o instance has before occurred, within the knowledge of the committee, where the President has felt himself authorized to fill [preexisting] vacancies, without special authority by law." 38 Annals of Cong. at 500.

The Executive's examples, moreover, highlight its overreach. For example, President Washington, in the two appointments the Executive cites, informed the Senate: "I nominate the following persons to fill the offices annexed to their names respectively; to which, *having fallen vacant during the recess* of the Senate, they have been appointed." S. Journal, 3d Cong., 1st Sess. 142-43 (1793) (announcing appointment of Robert Scott) (emphasis added); *see also* S. Journal, 4th Cong., 2d Sess. 216-17 (1796) (William Clark).

Similarly, Jefferson's appointments were made pursuant to a statute that left then-existing officeholders in their offices until President Jefferson removed them. *See* Act of Feb. 13, 1801, ch. 4, § 37, 2 Stat. 89, 99-100. Jefferson likely thus removed the incumbent officers during "the Recess," causing the vacancies to "happen during" the recess. As for Madison, his appointments of Roger Skinner and John Livingston were to offices created by legislation he signed on the day that the Third Session of the 37th Congress terminated. *See* Act of Mar. 3, 1815, ch. 95, 3 Stat. 235, 235 ("APPROVED, March 3, 1815"); S. Journal, 13th Cong., 3d Sess. 628 (1815) (end of session). Madison likely waited until "the Recess" had begun to sign the legislation, so that those vacancies, too, would "happen during the Recess."

In short, none of the first four presidents of the United States—founders and framers all—adopted the Executive's interpretation, even though it would have expanded their power. That is far more persuasive evidence than decades-later, self-serving executive opinions.

2. Because the text and original understanding rebut its argument, the Executive suggests that longstanding practice and Senate acquiescence have changed the Clause's meaning. But again, the political branches cannot bargain away (or squander) the Constitution's structural protections. In any event, however, the Executive Branch's position has been more equivocal than it lets on, while the Senate's resistance more robust.

a. Foremost, between the founding and 1866, Congress passed and the President signed at least 52 statutes empowering the President to make recess appointments to preexisting vacancies during the recess. *See* Appendix A. A typical statute provided that if offices were not filled "during the present session of Congress," then the President is "empowered, to make such appointment during the recess of the Senate, by granting commissions which shall expire at the end of their next session." Act of Aug. 2, 1813, ch. 56, § 2, 3 Stat. 82, 82.

78 years of Congresses and Presidents would not have bothered to provide this "special authority by law," 38 Annals of Cong. at 500, unless they thought it necessary. "The express grant of power by these enactments implies that, in the opinion of congress, the constitution had not given the power to [the President], or, to say the least, indicates the constant doubt of congress on the subject." *In re Dist. Att'y*, 7

F. Cas. at 743; *see also, e.g., Kungys v. United States*, 485 U.S. 759, 778 (1988) ("[T]he cardinal rule of statutory interpretation [is] that no provision should be construed to be entirely redundant."). And because numerous Presidents signed these statutes, each represents a choice to acquiesce in Congress's ability to prevent (or authorize) recess appointments to preexisting vacancies. To the extent there is any doubt about the "assumed *absence*" of this "power," *Printz*, 521 U.S. at 908, these enactments dispel it.[32]

b. In addition, Congress enacted the Pay Act on February 9, 1863, which prevented the payment of any salary to persons appointed to preexisting vacancies unless the Senate later confirmed them. *See* 12 Stat. 642, 646 (1863). The Executive makes the Orwellian assertion that "the restrictions that Congress has placed on salary payments to recess appointees who fill pre-existing vacancies" constitute "a form of congressional acquiescence in such appointments." Br. 36-37. But the power of the purse is Congress's principal weapon and this legislation exemplifies its use: "It may not be in our power to prevent the appointment, but it is in our power to prevent the payment; and when payment is prevented, I think that will probably put an end to the habit of making such appointments." Cong. Globe, 37th Cong., 3d Sess. 565 (1863) (Fessenden).

This statute thus embodies consistent disapproval of the Executive's construction until 1940, when Congress added the exceptions discussed *supra* at 28.

[32] Congress could not have dispensed with advice-and-consent for principal officers, so it likely believed that each of these statutes concerned inferior officers. But regardless, all that matters here is that Congress believed this legislation necessary to permit recess appointments to preexisting vacancies.

And as also noted above, the Senate has continued to fight back in other ways, including by placing blanket holds on nominations, convening pro forma sessions, and participating in litigation. *Supra* at 28-30.

3. Finally, the Executive invokes a few situations (deaths of officers where notice arrives late in the recess, vacancies arising late in the Session, offices created late in the Session) that it believes justify the supposedly "sensible" practice of unilateral appointments to every vacancy. Br. 32-34. But none of these unusual circumstances justify an unbounded power to fill longstanding vacancies during every short break with appointments lasting up to two years. As between minor inconveniences and an expansive unilateral appointments power, the framers would have been far more concerned about the latter (subject to abuse, as history confirms) than the former (by definition infrequent). Moreover, the President already has a constitutional tool to address such contingencies—he can keep the Senate in session to consider nominations pursuant to Art. II, § 3.

In any event, each of these entirely predictable possibilities existed at the founding and the framers were fully aware of them. Some States, like Massachusetts, expressly provided for such contingencies: "[I]n case a vacancy shall happen . . . in the recess of the General Court, *or at so late a period in any session* of the same Court, that the vacancy occasioned in any manner as aforesaid shall not be supplied in the same session thereof . . . ." 1782-83 *The Acts and Resolves of the Commonwealth of Massachusetts Bay* 523 (reprinted 1890) (emphasis

added). The framers were capable of including a similar caveat.

But they did not. Their solution was, rather, to let Congress pass statutes, when appropriate, that authorized the President to make recess appointments to preexisting vacancies—just as Congress often did in the century following ratification. *See* Appendix A. In addition, Congress has long provided for acting officers, such that "whenever a vacancy or non-occupancy shall occur during the session in any important office," the President may "order the duties to be performed by some public officer to whose appointment the Senate has already consented." S. Rep. No. 37-80, at 7-8; *see also* 5 U.S.C. § 3345 (contingency arrangements when officers are "unable to perform" their "functions and duties"). Legislation and political compromise—not Presidential arrogation of a sweeping unilateral appointments power—are how the Constitution leaves these isolated impracticalities to be resolved.

Moreover, preventing "impractical" situations is *never* a reason to reallocate formal powers. "The Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring). "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha*, 462 U.S. 919, 944 (1983). Rather, "the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to

concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 505 U.S. at 187.

III. The President Cannot Make Recess Appointments When The Senate Is Convening Pro Forma Sessions Every Three Days.

The Executive concedes that, if mid-Session recess appointments are allowed, Senate breaks must have some minimum duration to avoid the absurdity of lunchtime "recess" appointments. Although the Executive refuses to articulate any principled basis for its "de minimis exception"—invoking only its own "long" understanding, Br. 18—the only conceivable constitutional basis resides in the Adjournments Clause, which provides that neither House of Congress shall "adjourn for more than three days" without the other's consent. Art. I, § 5, cl. 4. As then-Assistant Attorney General William Barr testified with respect to the Pocket Veto Clause: "Where a House goes out on a brief recess and does not obtain the consent of the other House because it is not going to be over 3 days, then Congress remains in session and not adjourned." *Hearing on H.R. 849 Before the Subcomm. on the Legislative Process of the H. Comm. on Rules* 58, 101st Cong. (1989).[33]

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[33] This does not mean that over-three-day adjournments are "the Recess of the Senate" (if mid-Session breaks ever qualify). As General Daugherty explained, "an adjournment for 5 or even 10 days" likely would not count. 33 Op. Att'y Gen. at 25; see also 16 Op. O.L.C. at 15. But at an absolute minimum, the Senate is not in "the Recess" when it has not adjourned "for more than three days" under the Adjournments Clause. Art. I, § 5, cl. 4.

Here, the Senate never adjourned for more than three days.[34] Instead, on December 17, 2011, it adjourned pursuant to an order providing that it would "convene for pro forma sessions only, with no business conducted." *See* 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (Wyden). The Senate thereby stated its intent to "convene" in "sessions" and did, in fact, convene sessions every three days.[35] That should be conclusive.

The Executive, however, claims these sessions were constitutional nullities. *See* Br. 47-51. That is plainly incorrect. The Senate has used pro forma sessions for various constitutional purposes since at least the 1850s. That longstanding practice is proper, given that the Senate is fully capable of conducting Senate business at each pro forma session. It is, moreover, the Senate, not the President, that has constitutional authority to decide whether or not it is in session, and the Senate explicitly concluded it was in session here.

A. Pro Forma Sessions Have Long Been Used For A Variety Of Constitutional Purposes.

The Senate has used pro forma sessions—formal sessions at which the Senate can, but generally does not intend to, conduct business—hundreds of times

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[34] Sundays have always been a *dies non* in congressional parlance. *See, e.g.*, *Jefferson's Manual and Rules of the House of Representatives* § 83 (GPO 2007); Floyd M. Riddick, *Riddick's Senate Procedure* 15-16, 1265 (Alan S. Frumin ed., 1992) ("Riddick's"). This practice does not matter here, though, because the January 4 appointments were between sessions on January 3 and January 6—a three-day break by any measure.

[35] *See* 158 Cong. Rec. S1 (Jan. 3, 2012); *id.* at S3 (Jan. 6, 2012); *id.* at S5 (Jan. 10, 2012); *id.* at S7 (Jan. 13, 2012); *id.* at S9 (Jan. 17, 2012); *id.* at S11 (Jan. 20, 2012).

and for various purposes since 1854. Yet until now, no president ever attempted to make recess appointments while the Senate was convening such sessions. That "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *Pocket Veto Case*, 279 U.S. 655, 689 (1929).

1. Pro forma sessions date to at least 1854 when the Senate needed to undertake a "RENOVATION OF THE HALL." Cong. Globe, 33d Cong., 1st Sess. 1347 (1854). Because the House had not agreed to adjourn for more than three days—yet the renovators needed access to the Chamber—the Senate agreed to convene two short, formal sessions with no business conducted. *Id.* Those sessions were indistinguishable from the pro forma sessions here:

> IN SENATE
>
> Thursday, June 1, 1854
>
> The Journal of yesterday was read and approved.
>
> On motion by Mr. STUART,
>
> The Senate adjourned.
>
> Pursuant to a resolution passed yesterday, the Senate will not meet again until Monday.

Id. at 1353; *id.* (June 5, 1854) (similar). The Senate repeated this practice in later decades, including during the Pierce,[36] Benjamin Harrison,[37] McKinley,[38] and Wilson Administrations.[39]

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[36] Cong. Globe, 34th Cong., 1st Sess. 1368 (1856).

[37] 22 Cong. Rec. 843 (1890).

[38] 30 Cong. Rec. 842 (1897).

[39] 50 Cong. Rec. 2314–15 (1913).

Congress has convened hundreds of similar sessions since the 1850s to likewise discharge its constitutional obligations. *See, e.g.*, Appendix B. This longstanding practice is significant, because the Adjournments Clause ensures that both Houses of Congress are available to do business, including, *e.g.*, passing legislation and providing advice and consent. "[I]t would be very exceptionable to allow the senators, or even the representatives, to adjourn, without the consent of the other house, at any season whatsoever, without any regard to the situation of public exigencies." 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 368 (Jonathan Elliott ed., 2d ed. 1891) (Madison). Likewise, the Twentieth Amendment's annual-meeting requirement seeks "[t]o prevent those inconveniencies which might arise from the national legislatures omitting to assemble as often as the affairs of the nation require." St. George Tucker, 1 *Blackstone's Commentaries* 206 (1803).[40] Surely the Senate cannot be in "session" under these provisions while in "recess" under others.

Congress has also used pro forma sessions to pass legislation. Indeed, Congress did precisely that under the same adjournment order in place when the President made the appointments here. At its December 23, 2011, pro forma session, the Senate passed a two month extension of the Temporary Payroll Tax Cut Continuation Act of 2011. *See* 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). And at an indistinguishable August 5, 2011, pro forma session, the Senate passed Part IV of the Airport and Airway Extension Act of 2011. *See* 157 Cong. Rec. S5297

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[40] Tucker was referring to Article I, Section 4.

(daily ed. Aug. 5, 2011). The Senate passed these bills by unanimous consent during pro forma sessions no longer lasting or more elaborate than other pro forma sessions. *See id.* (59 seconds); 157 Cong. Rec. S8789-90 (daily ed. Dec. 23, 2011) (1 minute, 25 seconds).

Moreover, since at least the early 1980s—around when Presidents began aggressively using mid-Session recess appointments to circumvent Senate advice and consent—the Senate has relied on pro forma sessions to resist improper recess appointments. Senator Robert Byrd, for example, threatened to use them during the Reagan Administration. *See* 145 Cong. Rec. 29,915 (1999) (Inhofe) (explaining as much). As Senator Byrd stated, if President Reagan attempted to recess appoint a Supreme Court Justice, "he would not formally adjourn the Senate for the remainder of the year" and instead would "'have pro forma sessions.'" Hanrahan, *supra* (quoting Byrd). Subsequent Senates used pro forma sessions to prevent President George W. Bush and, later, President Obama, from making recess appointments.

2. No President has previously questioned the validity of these sessions. To the contrary, Presidents have demonstrated their agreement that these sessions are valid in numerous ways.

First, they have done so by signing—rather than vetoing—legislation that the Senate passed during pro forma sessions. Thus, on December 23, 2011, President Obama signed Temporary Payroll Tax Cut Continuation Act,[11] and, on August 5, 2011, he signed

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[11] *See* White House Office of the Press Secretary, *Statement by the Press Secretary on H.R. 3765* (Dec. 23, 2011),

the Airport and Airway Extension Act.[42] He never questioned either's validity.

Second, presidents have historically refrained from recess appointments where, as here, the Senate was convening regular pro forma sessions. For example, surveying recent Presidents, the Senate declined to adjourn for more than three days by convening at least:

- 13 pro forma sessions during the Carter Administration;
- 18 pro forma sessions during the Reagan Administration;
- 31 pro forma sessions during the George H.W. Bush Administration;
- 24 pro forma sessions during the Clinton Administration;
- 78 pro forma sessions during the George W. Bush Administration;
- and 39 pro forma sessions during the Obama Administration prior to January 4, 2012.

See App. B, *infra* at 20a-29a. Yet none of those Presidents attempted to make recess appointments during these sessions, even though all of them constituted "the Recess" under the Executive's construction. That "assumed absence" of this

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(continued...)

http://www.whitehouse.gov/the-press-office/2011/12/23/statement-press-secretary-hr-3765.

[42] *See* White House Office of the Press Secretary, *Statement by the Press Secretary on H.R. 2553* (Aug. 5, 2011), http://www.whitehouse.gov/the-press-office/2011/08/05/statement-press-secretary-hr-2553.

"power," *Printz*, 521 U.S. at 908—over four decades and five administrations of both parties—is highly probative.[43]

Third, just three years ago, the current Administration expressly recognized that pro forma sessions preclude recess appointments. As it told this Court: "Although a President may fill [Board] vacancies through the use of his recess appointment power . . . the Senate may act to foreclose this option by declining to recess for more than two or three days at a time over a lengthy period." Letter from Solicitor General to William K. Suter, Clerk, Supreme Court of the United States 3 (Apr. 26, 2010), *New Process Steel*, 130 S. Ct. 2635 (No. 08-1457) ("SG Letter"). The Administration emphasized that "the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007," *id.*, including during a period when it was convening pro forma sessions "with no business conducted," 153 Cong. Rec. S14,661 (daily ed. Nov. 16, 2007) (Webb).[44]

Finally, the Executive previously acknowledged that pro forma sessions count under the Clause. The OLC Memorandum authorizing the appointments

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[43] The Executive suggests that the Bush Administration believed otherwise, citing a 2010 newspaper editorial. Br. 58 n.57. The editorial, however, does not purport to reveal the Administration's position and, indeed, acknowledges that the pro forma sessions successfully "prevent[ed] a recess appointment." Steven G. Bradbury & John P. Elwood, *Recess Is Canceled*, Wash. Post, Oct. 15, 2010.

[44] The Executive tries to brush its prior statement aside as supported by little "analysis" in a "letter principally addressed to other subjects." Br. 58-59. The Executive, however, does not dispute that the letter squarely concluded that pro forma sessions "foreclose" the recess appointment "option," *SG Letter* at 3—hardly a novel position at the time, *see supra* at 53-55.

asserted that the "recess" began "on January 3, 2012, [when] the Senate convened one such pro forma session to begin the second session of the 112th Congress." *OLC Memo* at 1; *see also, e.g.*, 16 Op. O.L.C. 15, 15 n.1 (1992) (similar). It did so because the January 4 appointments were mid-Session appointments only if the Second Session of the 112th Congress began on January 3 (by virtue of the pro forma session). Taking the position that these were mid-Session appointments meant the appointees served until the end of both that Session *and* the "next Session"—a full two years.[45] Had the appointments been made before the new Session began, by contrast, the appointees would have served only until the end of the ensuing Session—just one year. It cannot be, however, that pro forma sessions count only when they *increase* executive power.

Recognizing the flaws in this pretzeled logic, the Executive has abandoned OLC's reasoning and now claims that the January 3 session did not commence the Second Session of the 112th Congress after all. Instead, the Executive invokes the supposedly-self-executing nature of the Twentieth Amendment, which it claims triggers each new Session of Congress *automatically*, "whether or not Congress in fact 'assemble[s]' on this date." Pet.C.A.Br. 54; Br. 48. The Twentieth Amendment, however, does not use the word "session" at all, and certainly does not provide that "a new enumerated annual session of Congress begins at noon on January 3" regardless of whether Congress assembles. Pet. 3 n.2. Instead, it says: "The Congress *shall assemble* at least once in every year, and *such meeting* shall begin at noon on

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[45] *See supra* n.5.

the 3d day of January." U.S. Const. amend. XX, § 2 (emphases added).

Consequently, as the Executive previously conceded, Congress's Session commenced on January 3 only if Congress actually "assemble[d]." Congress did "assemble"—in a pro forma session—and *that* is why the Second Session of the 112th Congress began on January 3, 2012.

3. Notwithstanding the above, the Executive makes the unprecedented claim that pro forma sessions do not satisfy the Adjournments Clause. Br. 60-61. But the Senate has been using pro forma sessions since at least 1854 without objection. That "[l]ong settled and established practice" is entitled to "great weight." *Pocket Veto Case*, 279 U.S. at 689.

Moreover, the only contrary evidence the Executive offers—an 1876 Senate debate—in fact proves the opposite. In that debate, the Senators discussed an adjournment order similar to the one here, in which the Senate would adjourn every three days with no expectation of doing business. Senator Conkling, upon whom the Executive chiefly relies, objected to the resolution because he believed it would mean "no Senator appears, no quorum appears, no action is taken, and another three days elapse in the absence of the Senate." 5 Cong. Rec. 335 (1876). He did not object, however, to having one or a few senators gavel the Senate into session with a "general understanding" that no business would be conducted. On the contrary:

> If it be the pleasure of a majority of the Senate to take a vacation over the holidays, the mode of doing it is so very simple,—by adjourning for three days with a general understanding among

> Senators that they are not to expect each other to attend at the next meeting and that at that time, there will be doubtless somebody here to move an adjournment from day to day.

Id. at 336 (Conkling).

The Senate did as Conkling suggested, adjourning for three days "with the general understanding . . . that when we meet again on the 26th we shall adjourn over until the 29th, and on the 29th to the 2d of January." *Id.* at 337 (Morrill). Like the pro forma sessions here, the Senate could convene these sessions with an assumed quorum, *infra* at 59, 62-63, with one Senator expressing his "faith that the point of the absence of a quorum will not be raised after a general understanding has been had that the Senate proposes . . . to transact no business." *Id.* at 336 (Morrill).[46]

B. Pro Forma Sessions Are Actual Senate Sessions.

It is clear, moreover, that pro forma sessions are fully functional sessions. At each, the presiding Senator is capable of exercising the full power of the Senate by simply acting through unanimous consent.

The Senate "operates on the absolute assumption that a quorum is always present until a point of no quorum"—*i.e.*, a quorum call—"is made," *Riddick's* at 1038, and thus possessed a formal quorum at each pro forma session. Unless and until a Senator makes a quorum call, this "absolute assumption" that a quorum is present enables the body to do business.

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[46] One Senator announced his intention to come and make quorum calls, 5 Cong. Rec. 338 (1876) (Edmunds), but did not follow through at the next session. *Id.* at 375 (Dec. 26).

The Executive's repeated assertions that the Chamber was "virtually empty," Br. 48, are based solely on conjecture and irrelevant C-SPAN videos. Unless Congress provides otherwise, the Senate's official record of its proceedings is contained in the Senate Journal and reflected in the Congressional Record.[47] Those sources say *nothing* about how many Senators attended each pro forma session and the courts surely cannot conduct fact-finding missions about how many Senators were in the chamber or standing ready in the cloakroom. Quorum calls are the only mechanism for ascertaining Senate attendance; unless one is made, actual attendance is unknown.

Even if it *were* possible to determine how many Senators attended each pro forma session, however, it would not matter. It is "unusual for as many as 51 Senators to be present on the floor at the same time,"[48] such that the Senate rarely has an actual quorum. The Senate's "absolute assumption" of a quorum nonetheless enables it to do business. *Riddick's* at 1038. That assumption means that whenever the Senate lacks a quorum (*i.e.*, most of the time), a single Senator can prevent the Senate from conducting business by making a quorum call. The Senate is thus effectively limited to doing business by unanimous consent most of the time.

The Senate is, moreover, "fundamentally a 'unanimous consent' institution." Walter J. Oleszek,

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[47] 44 U.S.C. § 903; Art. I, § 5, cl. 3.

[48] Elizabeth Rybicki, Cong. Research Serv., 96-452, *Voting and Quorum Procedures in the Senate* 1 (2013), http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%26*2D4QLO9%0A.

Cong. Research Serv., 98-225, *Unanimous Consent Agreements in the Senate* 1 (rev. 2001). For instance, "[i]n the last ten Congresses, 110th-101st, an average of 93 percent of approved measures did not receive roll call votes and in the 111th Congress through February 1, 2010, 94 percent of approved measures were approved without a roll call vote." 156 Cong. Rec. S7137-38 (daily ed. Sept. 15, 2010); *Riddick's* at 1311 ("Much of the routine activity on the Senate floor occurs as a result of simple unanimous consent agreements."). Most nominations, too, "are brought up by unanimous consent and approved without objection." Elizabeth Rybicki, Cong. Research Serv., RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure* 9 (2013).[49]

Accordingly, the Senate was fully capable of doing business at its pro forma sessions on January 3 and 6, 2012. The Chamber may have been full or it may have been mostly empty—the Senate's official records do not say. But either way, the presiding Senator could have sought unanimous consent, heard no objection, and proceeded to pass legislation, confirm nominees, or exercise any other Senate power—just like at any other Senate session.

C. The President Does Not Have "Discretion" To Second-Guess Senate Procedures.

Because the Senate can, in fact, do substantial business at pro forma sessions by unanimous consent, the Executive is reduced to attacking the

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[49] http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0E%2C*P%5C%3F3%22P%20%20%0A. The Senate has developed an informal system to facilitate the effective use of this tool. *See* Br. 54 n.53.

legitimacy of that procedure. The Executive contends that the Senate was in "recess" because "the remote possibility" of obtaining unanimous consent "cannot suffice to prevent an extended break from being a 'recess.'" Br. 52. But the Senate—not the President—is master of how the Senate will conduct business. *See, e.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935) ("The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there."); Laurence H. Tribe, *American Constitutional Law* § 4-13, at 267 (2d ed. 1988) (on "matters of legislative self-governance . . . the Constitution expressly makes each house a law unto itself"). After all, the Rules of Proceedings Clause empowers each House to "prescribe a method for . . . establishing the fact that the house is in a condition to transact business" and "it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just." *Ballin v. United States*, 144 U.S. 1, 5-6 (1892).

The Executive, therefore, may not nullify Senate sessions because it finds the Senate's rules too cumbersome. Presidents have discretion to decide whether to make recess appointments, and to select whom to appoint. But they may not *also* determine when that power is available. That decision is for the Senate alone.

D. The Executive's Contrary Arguments.

The Executive raises a series of counter-arguments, all erroneous.

1. The Executive contends that pro forma sessions do not count because "the Senate's 'members owe no

duty of attendance.'" Br. 45 (quotation omitted); *id.* at 3 (claiming that only the presiding Member must attend). But as explained above, the attendance obligation is irrelevant. "[T]he Senate operates on the absolute assumption that a quorum is always present." *Riddick's* at 1038. Whether there are one, five, or 55 Senators, it is absolutely assumed that the Senate has a quorum until its absence is shown.

Moreover, the Executive is wrong. Senators have the same attendance obligation at pro forma sessions as any other session. "Under Senate Rule VI, paragraph 2, Senators are required to attend all sessions of the Senate unless they are excused." *Riddick's* at 214; *see also* Senate Rule VI ("No Senator shall absent himself from the service of the Senate without leave."). Here, no Senator was "excused" from these sessions, and nothing in the December 17, 2011, adjournment order suspended Senate Rule VI. At any of these sessions, therefore, a Senator could have demanded a quorum call, "ascertained that a quorum is not present," Senate Rule VI, and made "a motion to direct the Sergeant at Arms to request the attendance of absent Senators," which motion would "generally" be "adopted." *Riddick's* at 214, 215, 217. If some Senators ignored their formal attendance obligation, that does not distinguish pro forma sessions from most sessions, which generally feature few Senators in the chamber.

Respondent International Brotherhood of Teamsters Local 760 (the "Union") attempts to avoid Rule VI by arguing that the adjournment order's prediction that no business would be conducted made quorum calls out of order. Union Br. 25 (citing

Riddick's at 1042). The Union is wrong. Quorum calls were in order at each pro forma session because each was a separate session punctuated by an adjournment and nothing in the Adjournment Order precluded quorum calls. "Upon the convening of the Senate following an adjournment or recess a quorum must be called upon demand." *Riddick's* at 1063. Any Senator could request a quorum call at any pro forma session, triggering the enforcement mechanisms for attendance.

2. The Executive likewise argues that this period of pro forma sessions was tantamount to a protracted break when leadership retains the power to "require either or both Houses to resume business during the recess if the public interest warrants." Br. 53. But the difference is obvious. When the Senate is in recess subject to being called back, it is in recess. It cannot act without first convening a session.

When the Senate is convening pro forma sessions, by contrast, it is in session and capable of doing business. The presiding Senator is empowered to read presidential messages, confirm nominees, recite the pledge of allegiance, offer a prayer, or do any of the other things the Executive latches onto in attempting to explain why these sessions are not "real" Senate sessions. That is precisely why the Senate was able to take official action on August 11, December 23, and January 3, and potentially on January 6. At each of those sessions, moreover, any Senator was free to enter the chamber, make a quorum call, and enforce the attendance obligation without any "public interest" trigger or hypothetical "reconvening."

3. The Union similarly contends that the Senate needed to "override" its adjournment order to do business. Union Br. 26 n.9. That is both incorrect and irrelevant. On the many occasions when the Senate has done business in pro forma sessions, it has never "overridden" anything. Instead, the Senate simply convenes and the presiding Senator requests and receives unanimous consent that "the bill be considered read three times and passed." 157 Cong. Rec. S8789 (Reid); 157 Cong. Rec. S5297 (Webb) (same). That is what happens whenever the Senate acts by unanimous consent. *See, e.g.*, Oleszek, *Unanimous Consent*, at 1 ("[T]he rules and precedents of the Senate are set aside regularly by the unanimous consent of the membership."). "The way the Senate conducts its business hour after hour, day after day, week after week, year after year, is Senators voluntarily waive the rights which they possess under the rules." *Id.* The Senate returns to its prior state when these temporary agreements expire. But regardless, whether or not the Senate "overrides" its prior agreement when it does business, its ability to do so simply confirms that the Senate is fully capable of doing business.

4. Finally, the Executive makes the convoluted argument that, because the Senate authorized actions during the series of pro forma sessions that are permitted while it is in session, that proves it was actually in recess. Br. 50-51. This strained inference cannot be drawn here, however, as the relevant authorizations are necessary during recesses *or adjournments*.

Here, the Senate took a series of short adjournments between each pro forma session. The

Orders the Executive invokes enabled certain actions during those adjournments. *Riddick's* is explicit about this for two of the examples. *See Riddick's* at 1193 (authorization for "committees to file reports during the recess *or adjournment*" (emphasis added)); *id.* at 830 (signing of "enrolled bills during the recess of the Senate, or *during an adjournment* to a day certain" (emphasis added)). And for the third, the Senate Order itself said "notwithstanding the upcoming recess *or adjournment* of the Senate . . . ." 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (Reid) (emphasis added).

Confirming that nobody believed these Orders created "the Recess," Majority Leader Reid entered indistinguishable Orders when he initiated pro forma sessions to prevent recess appointments. *See, e.g.*, 154 Cong. Rec. S8077 (daily ed. Aug. 1, 2008). Reid nonetheless made clear that the Senate was not entering "the Recess." *See* 154 Cong. Rec. S7558 (daily ed. July 28, 2008) ("[T]here will be no recess. We will meet every third day pro forma.").

Finally, to the extent the Executive finds it significant that Reid "characterized" the series of pro forma sessions as a "recess," Br. 51, that proves far too much. Senators routinely refer to short breaks—during which not even the Executive would claim recess appointments are permitted—as "recesses" or "the recess."[50] Moreover, Senator Reid also referred to the summer 2008 pro forma sessions—which he convened to successfully block recess appointments—as a "recess." *See* 154 Cong. Rec. S8077 ("[I]t stand[s]

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[50] *See, e.g.*, 158 Cong. Rec. S3388 (daily ed. May 21, 2012) ("recess from 12:30 until 2:15 p.m."); 158 Cong. Rec. S3154 (daily ed. May 15, 2012) (similar).

in recess and convene[s] for pro forma sessions."). The word "recess" is plainly not an incantation that animates the Clause whenever uttered.

* * *

In sum, the Executive's position appears to be that one "recess" began when the Senate adjourned on December 17, continued unbroken through a string of pro forma sessions, with the possible exception of the December 23 session wherein the Senate was actively passing legislation, until the Senate's pro forma session on January 3, when the first "recess" ended, but only by operation of the Twentieth Amendment (regardless of whether the Senate actually met), after which the Senate entered a second "recess" that persisted unbroken through another string of pro forma sessions until January 23, 2012, when the Senate reconvened to commence a Session that had officially begun twenty days earlier due to the Twentieth Amendment.

Reciting this rendition suffices to defeat it. Here, the Senate convened sessions every three days. It was therefore not in "the Recess of the Senate" when the President purported to make recess appointments.

IV. Enforcing The Clause's Limitations Comports With Its Limited Purpose.

"The Spirit of the Constitution favors the participation of the Senate in all appointments." *Randolph Opinion*, at 166. The framers greatly preferred the "general method" of appointment with Senate confirmation, *Federalist 67*, at 409, because it provided "an excellent check upon a spirit of favoritism in the President." *Federalist 76*, at 457. The Constitution thus requires Presidential and

Senate agreement before senior officials may wield the awesome power of the federal government. Consequently, the framers limited the "auxiliary method" to "temporary appointments 'during the recess of the Senate.'" *Federalist 67*, at 409-10. The central purpose of that authorization was to provide an emergency power in narrow circumstances, not to supply an all-purpose tool for installing difficult-to-confirm nominees. The Clause's limitations are fully in keeping with that limited purpose.

1. The Executive laments the Senate's ability to "strip" the President of his "constitutional authority to make recess appointments" by refraining from taking between-Session recesses. Br. 20. But of course the Senate can prevent recess appointments. The appointments power is "confided to the President and Senate *jointly*." *Federalist 67*, at 409-10. The Constitution itself requires compliance with the Appointments Clause whenever possible.

The Senate has the constitutional responsibility to insist upon advice and consent. Should the Senate do as the Executive fears, that is an inevitable corollary to the Constitution's advice-and-consent requirement. Moreover, should the Senate depart on a lengthy mid-Session break, and should the President need to install nominees, the Constitution supplies the proper tool. Presidents have the power to cancel Senate breaks and convene the Senate for the purpose of confirming nominees. *See* Art. II, § 3. What the President cannot do, however, is declare the Senate in "the Recess" because it is *unwilling* to confirm certain nominees.

Moreover, the Executive concedes that the Senate could "strip" it of this power by remaining

"continually in session for the appointment of officers." Br. 63-64. But if that is not what the Senate did here—convening "continually" in sessions where it could and did do official business—then it is impossible to know what passes muster. After all, the Senate is often "in session" with few Senators present, and it routinely confirms nominees by unanimous consent with an assumed quorum.

2. The Executive also claims that the President needs "officers to execute the laws" and thus needs a robust recess-appointment power in the face of the modern proliferation of mid-Session breaks. Br. 19-20. But the march of history rebuts that assertion. The modern Senate takes frequent mid-Session breaks only because technology enables it to do so without disrupting the nation's business. The early Senates refrained from such breaks precisely because nineteenth-century modes of transportation and communication would have rendered it unavailable to do the nation's business.

For that same reason, Senators are now perpetually available to address presidential requests. With internet, email, videoconferencing, and the like, unilateral appointments should be *less* common rather than *more*. Yet the opposite has happened—a trend the Executive seeks to accelerate by massively expanding the unilateral appointments power. *See Chadha*, 462 U.S. at 944 (the "inquiry is sharpened rather than blunted by the fact that [the challenged practice is] appearing with increasing frequency").

Moreover, if the Executive were actually concerned about making short-term appointments in exigent circumstances, then its construction would be

adapted to that concern. The Executive would, for instance, agree with Attorney General Evarts that "their next Session" refers to the period of Senate business between each recess, or with Attorney General Wirt that the appointment should "continue only until the Senate shall have passed upon it." 1 Op. Att'y Gen. at 632. But of course, the Executive does not take these narrower positions. It instead seeks to forge a powerful weapon for combating Senate refusal to confirm the President's preferred nominees.

3. Finally, the Executive claims that "history belies" the concern that its construction would enable the President "to evade the Senate's advice-and-consent role." Br. 20. History, however, shows the opposite, with this case as a marquee example. The same day that the President purported to appoint the Board members here, he "recess" appointed Richard Cordray as the head of the Consumer Financial Protection Bureau ("CFPB"). In doing so, the President stated: "[W]hen Congress refuses to act . . . I have an obligation as President to do what I can without them."[51] As he declared: "I refuse to take no for an answer." *Id.* There is thus no question that—in this very case—the President exercised his recess-appointment power "to evade the Senate's advice-and-consent role." Br. 20.

Moreover, limiting "litigation risk" has been a central factor in modern presidential restraint. *See, e.g., Quinn Memo* (noting that "recess appointments

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[51] The White House, *Remarks by the President on the Economy*, http://www.whitehouse.gov/photos-and-video/video/2012/01/04/president-obama-speaks-appointing-richard-cordray#transcript.

during [a] 10-day intrasession recess would . . . pose significant litigation risks"); *OLC Memo* at 4 ("[T]he substantial arguments on each side create some litigation risk."). This Court can be sure, however, that if it eliminates the "litigation risk," presidential restraint will disappear too. And vanishing along with it will be one of the "structural protections against abuse of power" "critical to preserving liberty." *Free Enter. Fund*, 130 S. Ct. at 3157.

* * *

Recent events confirm that our government functions best when constitutional provisions, such as the Recess Appointments Clause, are applied according to their terms. Last summer, after three courts of appeals enforced the Clause and voided the January 4 appointments, "the Senate confirmed four new Board members." Br. 7 n.3. The Senate confirmed those members pursuant to a political compromise with the President,[52] and, thanks to that process, the Board now has a Senate-confirmed quorum and the CFPB has a Senate-confirmed head. These events confirm the wisdom of this Court's aphorism that: "[T]he doctrine of separation of powers is a . . . prophylactic device, establishing high walls and clear distinctions." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). There is no reason, legal or practical, for the Court to short-circuit this laudable process by granting the President untrammeled power to make two-year, unilateral appointments whenever he pleases.

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[52] *See, e.g.*, Michael Memoli, *Senate confirms Obama choices for National Labor Relations Board*, L.A. Times, July 30, 2013.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

GARY E. LOFLAND
HALVERSON NORTHWEST
LAW GROUP
405 E. Lincoln Ave.
Yakima, WA
(509) 452-2828

LILY FU CLAFFEE
RACHEL L. BRAND
STEVEN P. LEHOTSKY
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202)463-5337

NOEL J. FRANCISCO
Counsel of Record
G. ROGER KING
JAMES M. BURNHAM
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
njfrancisco@jonesday.com
(202) 879-3939

Counsel for Respondent

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APPENDIX A

STATUTES GRANTING THE PRESIDENT AUTHORITY TO MAKE RECESS APPOINTMENTS TO FILL VACANCIES THAT DID NOT "HAPPEN DURING" THE RECESS

Commissions Expire at the End of the Next Session

Act of Mar. 3, 1791, ch. 15, § 4, 1 Stat. 199, 200

> "That if the appointment of the inspectors of surveys, or any part of them, shall not be made during the present session of Congress, the President may, and he is hereby empowered to make such appointments during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

Act of June 5, 1794, ch. 49, § 1, 1 Stat. 378, 379

> "That if the appointment of such supervisors and inspectors cannot be made, during the present session of Congress, the President may, and he is hereby empowered to make such appointments, during the recess of the Senate, by granting commissions, which will expire at the end of their next session."

Act of Apr. 7, 1798, ch. 28, § 3, 1 Stat. 549, 550

> "[T]hat if the President of the United States should find it most expedient to establish this government in the recess of Congress, he shall nevertheless have full power to appoint and commission all officers herein authorized; and their commissions shall continue in force until the end of the session of Congress next ensuing the establishment of the government."

Act of July 9, 1798, ch. 70, § 3, 1 Stat. 580, 584

> "That there shall be one commissioner appointed for each of said divisions, who shall reside within the same; and if the appointment of said commissioners, or any number of them, shall not be made during the present session of Congress, the President of the United States shall be, and he is hereby empowered to make such appointment during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

Act of Mar. 2, 1799, ch. 22, § 17, 1 Stat. 627, 639

> "And in case the appointment of the several collectors and surveyors for the new districts or ports established, or authorized to be established hereby, shall not be made during the present session of Congress, the President of the United States may, and he is hereby empowered to make such appointments during the recess of the Senate, by granting commissions, which shall expire at the end of their next session . . . ."

Act of May 7, 1800, ch. 41, § 3, 2 Stat. 58, 59

> "[T]hat the President of the United States shall have full power, in the recess of Congress, to appoint and commission all officers herein authorized; and their commissions shall continue in force until the end of the next session of Congress."

Act of Mar. 3, 1803, ch. 27, § 14, 2 Stat. 229, 234

> "That the President of the United States shall have full power to appoint and commission the surveyor, registers of the land-offices, and receivers of public monies above mentioned, in the recess of Congress, and their commissions shall continue in force until the end of the session of Congress next ensuing such appointment."

Act of Mar. 16, 1804, ch. 24, § 2, 2 Stat. 270, 270

> "That the President of the United States be, and he hereby is authorized to make the appointment of the said commissioners and agent, during the recess of the Senate, and to grant to the persons thus appointed, commissions which shall remain in force until the end of the next session of Congress, and no longer."

Act of Mar. 26, 1804, ch. 35, § 16, 2 Stat. 277, 282-83

> "That the President of the United States shall have full power to appoint and commission the several registers and receivers of public monies of the land-offices established by this act, in the recess of Congress; and their commissions shall continue in force until the end of the session of Congress next ensuing such appointment."

Act of Mar. 3, 1807, ch. 49, § 4, 2 Stat. 448, 448-49

> "That the President of the United States, in the recess of Congress, shall have full power to appoint and commission the registers and receivers of public monies of the land-offices established by this act, and their commissions shall continue in force until the end of the session of Congress next ensuing such appointment."

Act of July 22, 1813, ch. 16, § 2, 3 Stat. 22, 25-26

> "[A]nd if the appointment of the said collectors or any of them, shall not be made during the present session of Congress, the President of the United States shall be, and is hereby empowered to make such appointment during the recess of the Senate, by granting commissions, which shall expire at the end of their next session."

Act of Aug. 2, 1813, ch. 56, § 2, 3 Stat. 82, 82

> "That if the appointment of said collectors, or any of them shall not be made during the present session of Congress, the President shall be, and is hereby empowered to make such appointment during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

Act of Jan. 9, 1815, ch. 21, § 37, 3 Stat. 164, 178

> "That in cases where principal assessors have not been, or shall not, during the present session of Congress, be appointed, and in cases where vacancies shall occur in the office of principal assessor, the President of the United States is hereby authorized to make appointments during the recess of the Senate, by granting commissions, which shall expire at the end of the next session."

Act of Apr. 20, 1818, ch. 79, § 9, 3 Stat. 433, 436

> "And the President of the United States is hereby authorized, in the recess of the Senate, to appoint the appraisers of the said ports, which appointment shall continue in force until the end of the next session of Congress."

Act of Mar. 2, 1819, ch. 49, § 9, 3 Stat. 493, 495

> "That the President shall have full power, during the recess of the Senate, to commission all or any of the said officers, until the end of the session of Congress next succeeding the date of the commission."

Act of Mar. 3, 1819, ch. 93, § 2, 3 Stat. 523, 524

> "[A]nd the President of the United States shall be, and he is hereby, authorized, within the term aforesaid, to establish such districts, for the collection of the revenue, and, during the recess of Congress, to appoint such officers, whose commissions shall expire at the end of the next session of Congress . . . ."

Act of Mar. 3, 1821, ch. 39, § 3, 3 Stat. 637, 639

> "That the President of the United States be, and he is hereby, authorized to appoint, during the recess of the Senate, a commissioner and surveyor, whose commissions shall expire at the end of the next session of Congress . . . ."

Act of May 7, 1822, ch. 62, § 7, 3 Stat. 684, 684

> "But the President, in the recess of the Senate, may make temporary appointments of any such collector or surveyor, whose commission shall expire in forty days from the commencement of the next session of Congress thereafter."

Act of Mar. 1, 1823, ch. 21, § 16, 3 Stat. 729, 735-36

> "[A]nd the President of the United States is hereby authorized, in the recess of the Senate, to appoint the appraisers for the ports provided for in this section, which appointments shall continue in force until the end of the session of Congress thereafter."

Act of Mar. 3, 1823, ch. 29, § 1, 3 Stat. 754, 754-55

> "[T]he President is hereby authorized, in the recess of the Senate, to appoint three commissioners, which appointments shall be of force until the end of the next session of Congress thereafter . . . ."

Act of July 30, 1852, ch. 75, § 4, 10 Stat. 25, 26

> "And in case it shall be found necessary or expedient to establish said districts, or either of them, during the recess of Congress, the President shall be, and he is hereby authorized to appoint the necessary officers during such recess, and until the end of the next session of Congress . . . ."

Act of July 1, 1862, ch. 123, 12 Stat. 498, 498-99

> 'That the President be, and is hereby, authorized to appoint, by and with the advice and consent of the Senate, or during the recess thereof and until the end of its next session after such appointment, an agent for the Grand River and Wintah bands of Indians . . . ."

Act of July 3, 1866, ch. 164, § 2, 14 Stat. 82, 83

> "That the President is hereby authorized to appoint, by and with the advice and consent of the Senate, or during the recess thereof, and until the end of the next ensuing session, a register and receiver for said land district . . . ."

Appointments Must Be Submitted to the Senate

Act of July 1, 1797, ch. 7, § 9, 1 Stat. 523, 525

> "That the appointment of the officers to the frigates may be made by the President alone in the recess of the Senate; and their commissions, if so appointed, shall continue in force till the advice and consent of the Senate can be had thereupon at their next meeting which may happen thereafter."

Act of May 28, 1798, ch. 47, § 2, 1 Stat. 558, 558

> "That the President be, and he is hereby authorized to organize, . . . the said troops into corps of artillery, cavalry and infantry, as the exigencies of the service may require; and in the recess of the Senate, alone to appoint the commissioned officers. The appointment of the field officers to be submitted to the advice and consent of the Senate, at their next subsequent meeting."

Act of Mar. 2, 1799, ch. 31, § 2, 1 Stat. 725, 725

> "[T]hat the general and field officers who may be appointed in the recess of the Senate, shall, at the next meeting thereof, be nominated and submitted to them for their advice and consent."

Act of Mar. 26, 1804, ch. 38, § 6, 2 Stat. 283, 284

> "The governor, secretary, judges, district attorney, marshal, and all general officers of the militia, shall be appointed by the President of the United States, in the recess of the Senate; but shall be nominated at their next meeting for their advice and consent."

Act of Mar. 2, 1805, ch. 23, § 1, 2 Stat. 322, 322

> "That the President of the United States be, and he is hereby authorized to establish within the territory of Orleans, a government in all respects similar, . . . to that now exercised in the Mississippi territory; and shall, in the recess of the Senate, but to be nominated at their next meeting, for their advice and consent, appoint all the officers necessary therein . . . ."

Act of Mar. 2, 1805, ch. 26, § 3, 2 Stat. 324, 326

> "That for the purpose of more conveniently ascertaining the titles and claims to land in the territory ceded as aforesaid, the territory of Orleans shall be laid off into two districts, in such manner as the President of the United States shall direct; in each of which, he shall appoint, in the recess of the Senate, but who shall be nominated at their next meeting, for their advice and consent, a register . . . ."

Act of Mar. 3, 1805, ch. 31, § 8, 2 Stat. 331, 332

> "That the governor, secretary, and judges, to be appointed by virtue of this act, and all the additional officers authorized thereby, or by the act for erecting Louisiana into two territories, and providing for the temporary government thereof, shall be appointed by the President of the United States, in the recess of the Senate, but shall be nominated at their next meeting for their advice and consent."

Act of Apr. 12, 1808, ch. 43, § 8, 2 Stat. 481, 483

> "That in the recess of the Senate the President of the United States is hereby authorized to appoint all or any of the officers, other than the general officers, proper to be appointed under this act, which appointments shall be submitted to the Senate, at the next session, for their advice and consent."

Act of Mar. 3, 1809, ch. 28, § 3, 2 Stat. 535, 536

> "[T]hat the President may, and he is hereby authorized, in the recess of the Senate, to appoint all or any of such agents, which appointments shall be submitted to the Senate at their next session, for their advice and consent . . . ."

Act of May 1, 1810, ch. 44, § 2, 2 Stat. 608, 608

> "[T]hey shall respectively be appointed by the President of the United States, by and with the advice and consent of the Senate; but in the recess of the Senate, the President is hereby authorized to make such appointments, which shall be submitted to the Senate at the next session thereafter, for their advice and consent . . . ."

Act of Jan. 2, 1812, ch. 11, § 5, 2 Stat. 670, 670

> "That in the recess of the Senate, the President of the United States is hereby authorized to appoint all the officers proper to be appointed under this act; which appointments shall be submitted to the Senate at their next session for their advice and consent."

Act of Mar. 28, 1812, ch. 46, § 20, 2 Stat. 696, 699

> "That the President may, and he hereby is authorized in the recess of the Senate, to appoint the quartermaster general, deputy quartermasters, commissary general, and deputy commissaries, or any of them; which appointments shall be submitted to the Senate at their next session, for their advice and consent."

Act of July 6, 1812, ch. 137, § 2, 2 Stat. 784, 785

> "[T]hat the President of the United States be, and he is hereby authorized to appoint any of the officers named in this act during the recess of the Senate, to be submitted to the Senate at their next meeting, for their advice and consent."

Act of July 6, 1812, ch. 138, § 3, 2 Stat. 785, 785

> "That it shall be lawful for the President of the United States, in the recess of the Senate, to appoint all the officers authorized by this act; which appointments shall be submitted to the Senate, at their next session, for their advice and consent."

Act of Jan. 29, 1813, ch. 16, § 4, 2 Stat. 794, 795

> "That it shall be lawful for the President of the United States in the recess of the Senate to appoint such of the officers authorized by this act, as may not be appointed during the present session; which appointments shall be submitted to the Senate at their next session for their advice and consent."

Act of Mar. 3, 1813, ch. 48, § 6, 2 Stat. 816, 817

> "That the superintendent general of military supplies shall be appointed by the President, with the advice and consent of the Senate; but the President is hereby authorized to make the appointment during the recess of the Senate, which appointment shall be submitted to the Senate at their next meeting for the advice and consent."

Act of Mar. 3, 1813, ch. 52, § 9, 2 Stat. 819, 820

> "But all other new appointments authorized by this act shall be made by the President of the United States, with the advice and consent of the Senate: *Provided*, that during the recess of the Senate such appointments may be made by the President alone, in which case the same shall be laid before the Senate at their next session for their advice and consent."

Act of July 26, 1813, ch. 27, § 6, 3 Stat. 47, 48

> "That in the recess of the Senate, the President of the United States is hereby authorized to appoint all the officers proper to be appointed under this act, which appointments shall be submitted to the Senate at their next session for their advice and consent."

Act of Aug. 2, 1813, ch. 45, § 1, 3 Stat. 74, 74-75

> "That it shall be lawful for the President of the United States, in the recess of the Senate, to appoint such of the officers of the five regiments authorized by the act, entitled . . . and the act supplementary thereto, passed the fifth day of July, one thousand eight hundred and thirteen, as may not be appointed during the present session; which appointments shall be submitted to the Senate at their next session for their advice and consent."

Act of Apr. 16, 1814, ch. 58, § 4, 3 Stat. 124, 124-25

> "That it shall be lawful for the President of the United States, in the recess of the Senate, to appoint any of the officers authorized by this act; which appointments shall be submitted to the Senate at their next session, for their advice and consent."

Act of Apr. 16, 1814, ch. 59, § 3, 3 Stat. 125, 125

> "That it shall be lawful for the President of the United States to appoint, in the recess of the Senate, any of the officers authorized by this act, which appointments shall be submitted to the Senate at their next session."

Act of Apr. 18, 1814, ch. 67, § 2, 3 Stat. 128, 128

> "That the President of the United States shall have power to appoint any officer authorized by this act, during the recess of the Senate, to be submitted to them for their advice and consent, at their next session."

Act of Mar. 3, 1817, ch. 65, § 3, 3 Stat. 376, 377

> "That the President of the United States may, in the recess of the Senate, appoint any of the officers authorized by this act, which appointments shall be submitted to the Senate at their next session, for their advice and consent."

Act of Mar. 3, 1819, ch. 100, § 13, 3 Stat. 528, 532

> "That the President shall have power to appoint the register and receiver of public moneys for the said districts in the recess of the Senate, who shall be nominated to them at their next meeting."

Act of Mar. 3, 1823, ch. 36, § 2, 3 Stat. 769, 769

> "And the President shall have power, in the recess of the Senate, to make the appointments authorized by this act; but all appointments, so made, shall be submitted to the Senate at their next session, for confirmation."

Act of June 15, 1832, ch. 131, § 5, 4 Stat. 533, 533

> "That the President of the United States, by and with the advice and consent of the Senate, is hereby authorized to appoint all the officers proper to be appointed under this act; which appointments may be made during the recess of the Senate, but shall be submitted to the Senate at their next session, for their advice and consent . . . ."

Act of June 30, 1834, ch. 132, § 7, 4 Stat. 712, 713

> "That the commissions of the officers now in the marine corps shall not be vacated by this act, and that the President of the United States may, during the recess of the Senate, first by promotions according to rank and then by selections, appoint the officers hereby authorized, which appointments shall be submitted to the Senate, at their next session, for their advice and consent."

Act of July 25, 1861, ch. 19, § 2, 12 Stat. 275, 275

> "That the commissions of the officers now in the marine corps shall not be vacated by this act; and that the President of the United States may, during the recess of the Senate, first by promotions, and then by selections, appoint the officers hereby authorized, which appointments shall be submitted to the Senate, at their next session, for their advice and consent."

Act of Mar. 3, 1863, ch. 79, § 20, 12 Stat. 744, 753

> "That, in order to allow time for their thorough examination, the President may appoint the officers authorized by this act during the recess of Congress; which appointments shall be submitted to the Senate at their next session for their advice and consent."

APPENDIX B

ILLUSTRATIVE LIST OF SHORT, FORMAL SENATE SESSIONS IN THE MODERN ERA[1]

81st Congress

9/3/1949	95 Cong. Rec. 12600
5/29/1950	96 Cong. Rec. 7821
12/26/1950 – 1/1/1951	96 Cong. Rec. 17020, 17022

82nd Congress

3/26/1951	97 Cong. Rec. 2898
9/4/1951	97 Cong. Rec. 10956
4/14/1952	98 Cong. Rec. 3998–99

84th Congress

4/4/1955	101 Cong. Rec. 4293

85th Congress

7/5/1957	103 Cong. Rec. 10913

[1] Because pro forma sessions date to at least the mid-nineteenth century, this is a non-comprehensive list of pro forma sessions beginning at the time that Presidents began making frequent mid-Session recess appointments.

88th Congress

5/31/1963	109 Cong. Rec. 9896
7/5/1963	109 Cong. Rec. 12143
8/30/1963	109 Cong. Rec. 16181
11/29/1963	109 Cong. Rec. 22941

89th Congress

4/19/1965	111 Cong. Rec. 8105
5/31/1966	112 Cong. Rec. 11792
9/2/1966	112 Cong. Rec. 21738–39
10/8/1966	112 Cong. Rec. 25869

91st Congress

7/2/1970	116 Cong. Rec. 22619

92nd Congress

4/7/1971	117 Cong. Rec. 10161
4/21/1972	118 Cong. Rec. 13893

93rd Congress

3/2/1973	119 Cong. Rec. 6259

95th Congress

10/21/1977	123 Cong Rec. 34768
11/18/1977	123 Cong. Rec. 37781
12/12/1977	123 Cong. Rec. 38908

96th Congress

1/19/1979	125 Cong. Rec. 654
1/3/1980	126 Cong. Rec. D1
2/11/1980 – 2/14/1980	126 Cong. Rec. D130, D132, S1382
2/22/1980	126 Cong. Rec. D192, D193
3/3/1980	126 Cong. Rec. D256, D257
3/7/1980	126 Cong. Rec. D311, D312

97th Congress

1/8/1981 – 1/15/1981	127 Cong. Rec. D12, D19, S129
1/23/1981	127 Cong. Rec. D52
2/20/1981	127 Cong. Rec. D130

3/6/1981	127 Cong. Rec. D205
3/13/1981	127 Cong. Rec. D249
6/25/1982	128 Cong. Rec. D839
12/22/1982	128 Cong. Rec. D1496

98th Congress

4/8/1983	129 Cong. Rec. D436
4/25/1983	129 Cong. Rec. D533
5/4/1984	130 Cong. Rec. D597

99th Congress

1/28/1985	131 Cong. Rec. D26
2/4/1985	131 Cong. Rec. D44
3/4/1985	131 Cong. Rec. D144
3/11/1985	131 Cong. Rec. D187
3/22/1985	131 Cong. Rec. D257
10/11/1985	131 Cong. Rec. D1186
11/8/1985	131 Cong. Rec. D1346

100th Congress

2/27/1987	133 Cong. Rec. D219
6/15/1987	133 Cong. Rec. D817

101st Congress

1/27/1989	135 Cong. Rec. D31
2/3/1989	135 Cong. Rec. D53
2/21/1989	135 Cong. Rec. D86
2/27/1989	135 Cong. Rec. D115
3/13/1989	135 Cong. Rec. D200
5/5/1989	135 Cong. Rec. S4945
6/12/1989	135 Cong. Rec. D628
9/8/1989	135 Cong. Rec. D967
2/23/1990	136 Cong. Rec. D142

102nd Congress

1/8/1991	137 Cong. Rec. D46
1/18/1991	137 Cong. Rec. D78
1/25/1991	137 Cong. Rec. D97

2/1/1991	137 Cong. Rec. D122
3/1/1991	137 Cong. Rec. D218
3/8/1991	137 Cong. Rec. D264
3/15/1991	137 Cong. Rec. D318
4/15/1991	137 Cong. Rec. D403
4/19/1991	137 Cong. Rec. D450
5/13/1991	137 Cong. Rec. D571
6/10/1991	137 Cong. Rec. D719
10/11/1991	137 Cong. Rec. D1228, D1244
10/18/1991	137 Cong. Rec. D1276, D1278
11/8/1991	137 Cong. Rec. D1398, D1400
1/3/1992	138 Cong. Rec. D1
2/11/1992 – 2/14/1992	138 Cong. Rec. D92, D96
2/28/1992	138 Cong. Rec. D182
3/6/1992	138 Cong. Rec. D230
4/3/1992	138 Cong. Rec. D403

5/1/1992	138 Cong. Rec. D493
5/8/1992	138 Cong. Rec. D538
5/15/1992	138 Cong. Rec. D582
6/1/1992	138 Cong. Rec. D643
6/5/1992	138 Cong. Rec. D678

103rd Congress

1/22/1993	139 Cong. Rec. S641
2/22/1993	139 Cong. Rec. D127
3/1/1993	139 Cong. Rec. D156
4/23/1993	139 Cong. Rec. D397
5/14/1993	139 Cong. Rec. D522
6/18/1993	139 Cong. Rec. D682
9/16/1993	139 Cong. Rec. S11945
4/15/1994	140 Cong. Rec. D389
4/29/1994	140 Cong. Rec. D464
9/15/1994	140 Cong. Rec. D1071

104th Congress

2/5/1996	142 Cong. Rec. D61
2/13/1996 – 2/16/1996	142 Cong. Rec. D77, D80
3/4/1996	142 Cong. Rec. D132

105th Congress

1/27/1997	143 Cong. Rec. D49
2/3/1997	143 Cong. Rec. D68
4/21/1997	143 Cong. Rec. D364
5/27/1997 – 5/30/1997	143 Cong. Rec. D543, D545
2/13/1998	144 Cong. Rec. D97
9/4/1998	144 Cong. Rec. D938
10/19/1998	144 Cong. Rec. D1182

106th Congress

1/12/1999	145 Cong. Rec. D17
1/29/1999 – 2/2/1999	145 Cong. Rec. D89
3/1/1999	145 Cong. Rec. D188
9/17/1999	145 Cong. Rec. D1004

11/12/1999	145 Cong. Rec. D1299

107th Congress

2/5/2001	147 Cong. Rec. D95
2/12/2001	147 Cong. Rec. D116
5/18/2001	147 Cong. Rec. D477
9/17/2001	147 Cong. Rec. D903
9/28/2001	147 Cong. Rec. D949
10/5/2001	147 Cong. Rec. D984
10/26/2001	147 Cong. Rec. D1061
10/21/2002 – 11/8/2002	148 Cong. Rec. D1107, D1109, D1112, D1116, D1120, D1124, D1128

108th Congress

1/24/2003	149 Cong. Rec. D54–55
1/29/2004	150 Cong. Rec. D39
9/16/2004	150 Cong. Rec. D905

109th Congress

1/3/2006	152 Cong. Rec. D1

1/20/2006 – 1/24/2006	152 Cong. Rec. D10, D14

110th Congress

9/14/2007	153 Cong. Rec. D1198
11/9/2007	153 Cong. Rec. D1505
11/20/2007 – 11/29/2007	153 Cong. Rec. D1549, D1551, D1553, D1555
12/21/2007 – 1/18/2008	153 Cong. Rec. D1663, D1665, D1667, D1669; 154 Cong. Rec. D1, D3, D5, D7, D9, D25
2/15/2008 – 2/22/2008	154 Cong. Rec. D153, D155, D159
3/18/2008 – 3/27/2008	154 Cong. Rec. D329, D331, D333, D335
5/23/2008 – 5/29/2008	154 Cong. Rec. D663, D665, D667
6/30/2008	154 Cong. Rec. D837
7/27/2008	154 Cong. Rec. D961
8/5/2008 – 9/5/2008	154 Cong. Rec. D1017, D1019, D1021, D1023, D1025, D1027, D1029, D1031, D1033, D1035.

10/6/2008 – 11/13/2008	154 Cong. Rec. D1239, D1241, D1243, D1245, D1247, D1249, D1252, D1255, D1257, D1259, D1261, D1263, D1266,
11/24/2008 – 12/5/2008	154 Cong. Rec. D1291, D1293, D1295, D1297, D1300
12/12/2008 – 1/2/2009	154 Cong. Rec. D1323, D1325, D1327, D1329, D1331, D1333, D1335

111th Congress

8/10/2009	155 Cong. Rec. D997
10/9/2009	155 Cong. Rec. D1163
1/5/2010	156 Cong. Rec. D2
1/19/2010	156 Cong. Rec. D15
10/1/2010 – 11/12/2010	156 Cong. Rec. D1050, D1055, D1057, D1059, D1061, D1063, D1065, D1067, D1069, D1072, D1073, D1075, D1077, D1079

112th Congress

5/27/2011 – 6/3/2011	157 Cong. Rec. D573, D577, D598

7/1/2011	157 Cong. Rec. D721
8/5/2011 – 9/2/2011	157 Cong Rec. D897, D901, D903, D905, D907, D909, D911, D913, D915
9/29/2011	157 Cong. Rec. D1027
10/7/2011	157 Cong. Rec. S6357
10/24/2011 – 10/27/2011	157 Cong. Rec. S6893, D1149
11/22/2011 – 11/25/2011	157 Cong. Rec. D1259, D1261
12/20/2011 – 1/20/2012	157 Cong. Rec. D1392, D1398, D1401, D1404; 158 Cong. Rec. D2, D5, D7, D9, D12, D21
2/21/2012 – 2/24/2012	158 Cong. Rec. D141, D143
5/25/2012 – 5/31/2012	158 Cong. Rec. D526, D529, D537
8/3/2012	158 Cong. Rec. D825
9/17/2012	158 Cong. Rec. S6391

9/25/2012 – 11/9/2012	158 Cong. Rec. D911, D913, D915, D917, D919, D921, D923, D925, D927, D929, D931, D933, D935, D937
11/16/2012	158 Cong. Rec. S6875
12/24/2012	158 Cong. Rec. D1069

113th Congress

4/26/2013 – 5/3/2013	159 Cong. Rec. D387, D391, D393
7/19/2013	159 Cong. Rec. D729

APPENDIX C

United States Constitution, art. 1, § 5, cl. 1 provides:

§ 5, Clause 1. Legislative Proceedings; Each House as Judge of Qualifications and Election of Its Members; Quorum; Adjournments; Compelling Attendance of Members

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

United States Constitution, art. 1, § 5, cl. 2 provides:

§ 5, Clause 2. Rules; Punishment and Expulsion of Members

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

United States Constitution, art. 1, § 5, cl. 3 provides:

§ 5, Clause 3. Journal; Publication; Recording of Yeas and Nays

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

United States Constitution, art. 1, § 7, cl. 3 provides:

§ 7, Clause 3. Approval or Veto of Orders, Resolutions, or Votes; Repassage Over Veto

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

United States Constitution, art. 2, § 2, cl. 3 provides:

§ 2, Clause 3. Recess Appointments

The President shall have power to fill up all vacancies that may happen during the recess of the

Senate, by granting commissions which shall expire at the end of their next session.

United States Constitution, art. 2, § 3 provides:

§ 3. Messages; Convene and Adjourn Congress; Receive Ambassadors; Execute Laws; Commission Officers

He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

The Articles of Confederation, art. 5, para. 1 provides:

Art. 5. § 1.

For the most convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislatures of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

Act of Feb. 13, 1801, ch. 4, § 37, 2 Stat. 89, 99-100, provides:

Sec. 37.

And be it further enacted, That there shall be appointed for each of the districts hereby established, a person learned in the law, to act as attorney for the United States within such district, and in the circuit and district courts which may be holden therein; which attorney shall take an oath or affirmation for the faithful performance of the duties of his office, and shall prosecute, in such district, all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions or suits in which the United States shall be concerned, except actions or suits in the supreme court of the United States; and shall be entitled to, and receive, for their services, such compensations, emoluments, and fees, as by law are or shall be allowed, to the district attornies [sic] of the United States: *Provided always*, that the district attornies [sic] now in office shall, severally and respectively, be attornies [sic] for those districts hereby established, until removed by the President of the United States; and shall perform the duties, exercise the power, and receive the emoluments, hereby directed to be performed, exercised, and received, by the attorney of the United States therein.

Act of Aug. 2, 1813, ch. 56, § 2, 3 Stat. 82, 82, provides:

Sec. 2.

And be it further enacted, That the President of the United State be, and he is hereby authorized to divide respectively the several territories of the United States and the District of Columbia into convenient districts for the purpose of collecting the internal duties above specified, and to nominate and by and with the advice and consent of the Senate appoint a collector for every such district: *Provided*, That any of the said territories, as well as the District of Columbia, may, if the President shall think it proper, be erected into one collection district only: *And provided also*, That if the appointment of the said collectors, or any of them shall not be made during the present session of Congress, the President shall be, and is hereby empowered to make such appointments during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Act of Mar. 3, 1815, ch. 95, 3 Stat. 235, 235, provides:

Chap. XCV.—*An Act supplementary to an act, entitled "An act for the better organization of the courts of the United States, within the state of New York."*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the President of the United States, by and with the advice and consent of the Senate, be, and hereby is authorized to appoint

one person as marshal, and one as district attorney for the northern judicial district of the United States within the state of New York, created by the act to which this act is a supplement, bearing the date the ninth day of April, in the year one thousand eight hundred and fourteen; and that the terms of appointment and service, together with the duties, responsibilities and emoluments of the said marshal and district attorney, respectively, for the district aforesaid, be in all respects the same within their said district, as the terms of appointment and service, the duties, responsibilities and emoluments of all other marshals and district attorneys, respectively, within their respective districts, in the United States of America.

Act of Feb. 9, 1863 (1863 Pay Act), ch. 25, § 2, 12 Stat. 642, 646, provides:

Sec. 2.

And be it further enacted, That no money shall be paid from the Treasury of the United States to any person acting or assuming to act as an officer, civil, military, or naval, as salary, in any office, which office is not authorized by some previously existing law, unless where such office shall be subsequently sanctioned by law, nor shall any money be paid out of the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, which vacancy existed while the Senate was in session and is by law required to be filled by and with the advice and consent of the Senate, until such appointee shall have been confirmed by the Senate.

Act of July 11, 1940 (1940 Pay Act), ch. 580, 54 Stat. 751, 751, provides:

Sec. 1761.

No money shall be paid from the Treasury, as salary, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate. The provisions of this section shall not apply (a) if the vacancy arose within thirty days prior to the termination of the session of the Senate; or (b) if, at the time of the termination of the session of the Senate, a nomination for such office, other than the nomination of a person appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or (c) if a nomination for such office was rejected by the Senate within thirty days prior to the termination of the session and a person other than the one whose nomination was rejected thereafter receives a recess commission: *Provided*, That a nomination to fill such vacancy under (a), (b), or (c) hereof, shall be submitted to the Senate not later than forty days after the commencement of the next succeeding session of the Senate.

5 U.S.C. § 5503 (Modern Pay Act) provides:

§ 5503. Recess appointments

(a) Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a

vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate. This subsection does not apply—

(1) if the vacancy arose within 30 days before the end of the session of the Senate;

(2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or

(3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.

(b) A nomination to fill a vacancy referred to by paragraph (1), (2), or (3) of subsection (a) of this section shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate.

5 U.S.C. § 3345 provides:

§ 3345. Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if-

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

44 U.S.C. § 903 provides:

§ 903. Congressional Record: daily and permanent forms

The public proceedings of each House of Congress as reported by the Official Reporters, shall be printed in the Congressional Record, which shall be issued in daily form during each session and shall be revised, printed, and bound promptly, as directed by the Joint Committee on Printing, in permanent form, for distribution during and after the close of each session of Congress. The daily and the permanent Record shall bear the same date, which shall be that of the actual day's proceedings reported. The "usual number" of the Congressional Record may not be printed.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

MAY 13 2013

No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
NOEL CANNING,
A DIVISION OF THE NOEL CORP.,
and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL 760,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760 IN SUPPORT OF THE PETITION

BRADLEY T. RAYMOND
25 Louisiana Avenue, NW
Washington, DC 20001

Of Counsel:
LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
202-637-5337

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BRIEF FOR INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760 IN SUPPORT OF THE PETITION

International Brotherhood of Teamsters Local 760 – the charging party before the National Labor Relations Board and the intervenor in the court of appeals – files this brief in support of the petition for a writ of certiorari.

STATEMENT

This case arises out of the 2010 negotiations between Noel Canning and Teamsters Local 760 over a successor collective bargaining agreement. Pet. App. 65a-66a. At the December 8 bargaining session, the Company and Union negotiators reached agreement on all the terms of a new collective bargaining agreement. *Id.* at 66a-67a. One element of the agreement was that the covered employees would be allowed to vote to select one of two wage-benefit packages. *Id.* at 67a. On December 15, the employees voted to select one of the packages. *Id.* at 75a. The Union then drafted a collective bargaining agreement containing the agreed upon terms, including the wage-benefit package selected by the employees, and presented it to Noel Canning. *Id.* at 80a. The Company refused to execute the collective bargaining agreement, insisting that the parties had not reached agreement on the alternative wage-benefit packages. *Id.* at 83a-84a.

The Union filed unfair labor practice charges with the National Labor Relations Board alleging that the Company's refusal to execute the agreed-upon contract constituted bad faith bargaining in violation of

Section 8(a)(5) of the National Labor Relations Act. Pet. App. 63a. The NLRB General Counsel concluded that the Union's charges had merit and issued a complaint alleging that Noel Canning had violated NLRA § 8(a)(5). *Id.* at 64a.

Noel Canning "conceded to the Board that '[i]t is not in dispute that an employer violates [the NLRA] by refusing to execute a Collective Bargaining Agreement incorporating all of the terms agreed upon by the parties during negotiations.'" Pet. App. 10a. "[T]he company's chief argument before the Board [was] that the parties failed to reach *any* agreement at the December 2010 negotiation session." *Id.* at 9a (emphasis in original). The Board, however, accepted the administrative law judge's determination that the witnesses who testified that an agreement had been reached were more credible than the witnesses who testified that an agreement had not been reached. *Id.* at 81a-82a. On this basis, the Board found that an agreement had been reached and that Noel Canning's failure to execute a collective bargaining agreement containing the agreed-upon terms was a violation of the Company's duty to bargain in good faith. *Id.* at 84a.

In challenging the Board's decision, Noel Canning advanced two perfunctory arguments on the merits. The Company argued first – contrary to the position it had taken before the Board and contrary to well-settled law – that it had a right under the State of Washington's statute of frauds to repudiate the oral agreement it had reached with the Union. Second, the Company challenged the credibility determination of the administrative law judge on the ground

that the affidavit submitted to the NLRB by one of the credited witnesses suggested that an agreement different than that reached by the negotiators had been presented to the Union membership for a vote. The court of appeals quickly disposed of both arguments. Pet. App. 7a-10a.

Noel Canning's principal argument in the court of appeals was that the NLRB lacked a quorum on the date the Board issued its decision in this case, because three of the sitting members had been invalidly appointed. The three members in question had been appointed on January 4, 2012 pursuant to the President's recess appointment authority. The Company argued that the Senate was not in recess on that date because it had convened in a pro forma session on January 3 and was scheduled to convene in another pro forma session on January 6.

The court of appeals ruled that the three challenged NLRB members had not been validly appointed but did so based on an interpretation of the Recess Appointments Clause that had not been advanced by any party or amicus. *See* D. C. Cir. Oral Arg. Tr. 10 & 25 (asking first the petitioner and then an amicus for petitioner why they had not advanced the interpretation ultimately adopted by the court of appeals). The court of appeals first held unanimously that the President can exercise his recess appointment authority only during the recesses that occur between sessions of Congress. Pet. App. 34a. Since the January 4, 2012 appointments were made after the second session of the 112th Congress had begun, the court held that the appointments were invalid on that basis. A majority of the court of appeals panel

further held that the President may exercise his recess appointment authority to fill only those vacancies that first arise during the intersession recess in which the appointments are made. The panel majority held that the three vacancies filled by the January 4, 2012 appointments did not arise during the recess and that the appointments were invalid on that basis as well.

ARGUMENT

The Recess Appointments Clause provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. The decision below reads this clause as providing that "the President shall have Power to fill up [only those] Vacancies that [first arise] during the [intersession] Recess of the Senate, by granting Commissions [during the recess in which the vacancies first arise]." This construction of the Recess Appointments Clause would nullify the President's recess appointment power during any period in which Congress – as it has done since the Civil War – follows the practice of taking relatively long *intra*session recesses but short *inter*session recesses.

"[T]he main purpose of the Recess Appointments Clause [is] to enable the President to fill vacancies to assure the proper functioning of our government" during periods when the Senate is absent and thus unavailable to give its "Advice and Consent" on Presidential appointments. *Evans v. Stephens*, 387

F.3d 1220, 1226 (11th Cir. 2004) (*en banc*). As Attorney General Stanbery observed 150 years ago, "it is of the very essence of executive power that it should always be capable of exercise," and "to meet this necessity, there is a provision . . . against vacancies in all the subordinate offices [providing] that at all times there is a power to fill such vacancies." *President's Power to Fill Vacancies in Recess of the Senate*, 12 Op. Att'y Gen 32, 35 & 38 (1866). By construing the Recess Appointments Clause in a manner that radically constricts the President's authority to fill vacancies during periods when the Senate is absent and unable to pass on nominations, the decision below "contravenes the President's 'constitutional obligation to ensure the faithful execution of the laws.'" *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. ___, 130 S.Ct. 3138, 3147 (2010) (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)).

The interpretation of the Recess Appointments Clause adopted by the court below conflicts with the settled understanding of the Executive and Legislative branches as to the meaning of that constitutional provision. The decision below adopting that interpretation also conflicts with the decisions of every other federal court to have addressed the meaning of the Recess Appointments Clause. What is more, the effect of the decision below is to render the National Labor Relations Act unenforceable with respect to any employer who chooses to petition for the review of an NLRB decision in the D.C. Circuit. This Court should, therefore, grant the petition for a writ of certiorari.

A. The D.C. Circuit's interpretation of the phrase "the Recess of the Senate" was first advanced in the opinion of Attorney General Knox advising President Theodore Roosevelt that "[t]he interval between the[] two sessions [of Congress] is *the* recess" within the meaning of the Recess Appointments Clause. *President – Appointment of Officers – Holiday Recess*, 23 Op. Att'y Gen. 599, 604 (1901) (emphasis in original). Acting on this understanding of the clause, President Roosevelt made a large number of appointments during the "constructive recess" between the end of the first session and the immediate beginning of the second session of the 58th Congress at noon on December 7, 1903. Vivian S. Chu, Cong. Res. Serv., *Recess Appointments: A Legal Overview* at 8 (2011).

The Senate immediately responded to President Roosevelt's action with a resolution instructing the Committee on the Judiciary "to report what constitutes a 'recess of the Senate,' and what are the powers and limitations of the Executive in making appointments in such cases." 39 Cong. Rec. 3823 (1905) (describing the 1903 resolution). The result was the influential 1905 Senate Report rejecting Attorney General Knox's understanding that the term "recess" as used in the Recess Appointments Clause is a technical term referring to "[t]he interval between the[] two sessions [of Congress]," 23 Op. Att'y Gen. at 604, and concluding, to the contrary, that "[t]he word 'recess' is one of ordinary, not technical, signification, and it is evidently used in the constitutional provision in its common and popular sense." S.Rep. No. 4389, 58th Cong., 3d Sess., p. 1 (1905), reprinted in 39 Cong. Rec. 3823-24 (1905).

Attorney General Daugherty accepted the Senate's interpretation of the term "Recess" in 1921. *Executive Power-Recess Appointments*, 33 Op. Att'y Gen. 20, 24-25 (1921). Since then, "[t]he Department of Justice has long interpreted the term 'recess' to include intrasession recesses if they are of substantial length." *Intrasession Recess Appointments*, 13 Op. O.L.C. 271, 272 (1989). "[T]he Comptroller General[,] an officer in the legislative branch," later expressed "his full concurrence in the position taken by the Attorney General in 33 Op. Att'y Gen. 20." *Recess Appointments*, 41 Op. Att'y Gen. 463, 469 (1960). *See Appointments – Recess Appointments*, 28 Comp. Gen. 30, 35-37 (1948). More than four hundred intrasession recess appointments have been made over the last century with no objection from the Senate. *See* Hogue, *Intrasession Recess Appointments*, Cong. Res. Serv. 3-4 (2004); Hogue, et al., *The* Noel Canning *Decision and Recess Appointments Made From 1981-2013*, Cong. Res. Serv. 22-28 (2013).

With the sole exception of the D.C. Circuit, the various federal courts that have addressed the matter agreed with the Executive and Legislative branches that the phrase "the recess of the Senate" as used in the Recess Appointment Clause "includes an intrasession recess." *Evans*, 387 F.3d at 1224 (capitalized heading in original). *See Nippon Steel Corp. v. International Trade Comm'n*, 239 F.Supp.2d 1367, 1374 n. 13 (Ct. of Int'l Trade 2002) (relying on "the long history of the practice (since at least 1867) without serious objection by the Senate"); *Gould v. United States*, 19 Ct. Cl. 593, 595-96 (1884).

The *Noel Canning* opinion – like the 1903 opinion of Attorney General Knox – rests on the understanding that "[t]he interval between the[] two sessions [of Congress] is *the* recess" within the meaning of the Recess Appointments Clause. 23 Op. Att'y Gen. at 604. *See* Pet. App. 34a ("'[T]he Recess' is limited to intersession recesses."). That mechanical interpretation of the phrase is contrary to the Senate's conclusion – a conclusion that has been embraced by both the Executive and Legislative branches for more than one hundred years – that "[t]he word 'recess' is one of ordinary, not technical, signification, and it is evidently used in the constitutional provision in its common and popular sense." S.Rep. No. 4389, 58th Cong., 3d Sess., p. 1. That understanding of the phrase is consistent with the constitutional language and best accomplishes the purpose of granting the President the authority to make recess appointments.

B. The D.C. Circuit's holding that the word "happen" as used in the Recess Appointments Clause "means 'arise' or 'begin' or come into being,'" Pet. App. 35a, is likewise contrary to the long-held view of the Executive and Legislative branches, which has been endorsed by three circuits.

The Recess Appointments Clause states that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate." Consistent with this broad statement of the President's recess appointment power – to "fill up *all* vacancies that may happen during the Recess" – the long accepted interpretation of the Clause has been that the President is authorized to fill up all vacan-

cies that may "happen to exist" during the recess of the Senate regardless of when the vacancies first arise. *Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. 631, 632 (1823).

Nearly two hundred years ago, Attorney General Wirt explained why the recess appointment authority of the President should not be confined to vacancies that first occur while the Senate is in recess:

> "In reason, it seems to me perfectly immaterial when the vacancy first arose; for, whether it arose during the session of the Senate, or during their recess, it equally requires to be filled. The constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act." 1 Op. Att'y Gen. at 633.

As the Eleventh Circuit observed, Congress has expressed its agreement with the common sense interpretation of the Recess Appointments Clause by passing a law addressed to the "salary requirements for officers appointed to fill a vacancy that existed while [the] Senate was in session." *Evans*, 387 F.3d at 1226 (describing 5 U.S.C. § 5503). *See also Appointments – Recess Appointments*, 28 Comp. Gen. at 33 (interpreting the Pay Act to "permit the payment of persons appointed to fill offices requiring Senatorial confirmation during periods while the Senate was not in session, if nominations had been submitted during the session of the Senate and not acted upon"). Prior to the *Noel Canning* decision, every federal court addressing the question adopted this view. *See Evans*, 387 F.3d at 1226-27; *United*

States v. Woodley, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (*en banc*); *United States v. Allocco*, 305 F.2d 704, 710-12 (2d Cir. 1962).

The long-held view of the Executive and Legislative branches that the President has authority to fill *all* vacancies that exist during a recess of the Senate is the correct interpretation.

C. The circumstances of this case demonstrate that construing the Recess Appointments Clause in a manner that "enable[s] the president to fill vacancies" is necessary "to assure the proper functioning of our government." *Evans*, 387 F.3d at 1226.

There is no question that Noel Canning has blatantly violated the National Labor Relations Act. The Company barely pretended otherwise in challenging the Board's decision. Rather, the Company has depended entirely on the asserted lack of an NLRB quorum to escape enforcement of that federal law. Not only has the Company's past violation gone completely unremedied, but the Company has continued to violate the law by refusing to negotiate for a successor collective bargaining agreement, citing the pendency of this case as an excuse.

The D.C. Circuit has jurisdiction to review every decision of the National Labor Relations Board. That court has dozens of cases coming from the National Labor Relations Board currently pending before it, and all of those cases are being held in abeyance awaiting resolution of the recess appointment issue in this case. With regard to the enforcement of the NLRA, then, there is no question that the decision of the court below is currently frustrating "the

President's 'constitutional obligation to ensure the faithful execution of the laws.'" *Free Enterprise Fund*, 130 S.Ct. at 3147 (quoting *Morrison*, 487 U.S. at 693).

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the court of appeals should be reversed.

Respectfully submitted,

BRADLEY T. RAYMOND
25 Louisiana Avenue, NW
Washington, DC 20001

Of Counsel:
LAURENCE GOLD
805 Fifteenth Street, NW
Washington, DC 20005

JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
202-637-5337

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BRIEF FOR RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760 IN SUPPORT OF THE PETITIONER NATIONAL LABOR RELATIONS BOARD

BRADLEY T. RAYMOND
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5337

Of counsel:

LAURENCE GOLD
805 Fifteenth Street, N.W.
Washington, D.C. 20005

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BRIEF FOR RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760 IN SUPPORT OF THE PETITIONER NATIONAL LABOR RELATIONS BOARD

International Brotherhood of Teamsters Local 760 – the charging party before the National Labor Relations Board and the intervenor in the court of appeals – files this brief in support of the petitioner National Labor Relations Board.

STATEMENT

This case arises out of the 2010 negotiations between Noel Canning and Teamsters Local 760 over a successor collective bargaining agreement. Pet. App. 65a-66a. At the December 8 bargaining session, the Company and Union negotiators reached agreement on all the terms of a new collective bargaining agreement. *Id.* at 66a-67a. One element of the agreement was that the covered employees would be allowed to vote to select one of two wage-benefit packages. *Id.* at 67a. On December 15, the employees voted to select one of the packages. *Id.* at 75a. The Union then drafted a collective bargaining agreement containing the agreed upon terms, including the wage-benefit package selected by the employees, and presented it to Noel Canning. *Id.* at 80a. The Company refused to execute the collective bargaining agreement, insisting that the parties had not reached agreement on the alternative wage-benefit packages. *Id.* at 83a-84a.

The Union filed unfair labor practice charges with the National Labor Relations Board alleging that the Company's refusal to execute the agreed-upon con-

tract constituted bad faith bargaining in violation of Section 8(a)(5) of the National Labor Relations Act. Pet. App. 63a. The NLRB General Counsel concluded that the Union's charges had merit and issued a complaint alleging that Noel Canning had violated NLRA § 8(a)(5). *Id.* at 64a.

Noel Canning "conceded to the Board that '[i]t is not in dispute that an employer violates [the NLRA] by refusing to execute a Collective Bargaining Agreement incorporating all of the terms agreed upon by the parties during negotiations.'" Pet. App. 10a. "[T]he company's chief argument before the Board [was] that the parties failed to reach *any* agreement at the December 2010 negotiation session." *Id.* at 9a (emphasis in original). The Board, however, accepted the administrative law judge's determination that the witnesses who testified that an agreement had been reached were more credible than the witnesses who testified that an agreement had not been reached. *Id.* at 81a-82a. On this basis, the Board found that an agreement had been reached and that Noel Canning's failure to execute a collective bargaining agreement containing the agreed-upon terms was a violation of the Company's duty to bargain in good faith. *Id.* at 84a.

In challenging the Board's decision, Noel Canning advanced two perfunctory arguments on the merits. The Company argued first – contrary to the position it had taken before the Board and contrary to well-settled law – that it had a right under the State of Washington's statute of frauds to repudiate the oral agreement it had reached with the Union. Second, the Company challenged the credibility determina-

tion of the administrative law judge on the ground that the affidavit submitted to the NLRB by one of the credited witnesses suggested that an agreement different than that reached by the negotiators had been presented to the Union membership for a vote. The court of appeals easily disposed of both arguments. Pet. App. 7a-10a.

Noel Canning's principal argument in the court of appeals was that the NLRB lacked a quorum on the date the Board issued its decision in this case, because three of the sitting members had been invalidly appointed. The three members in question had been appointed on January 4, 2012 pursuant to the President's recess appointment authority. The Company argued that the Senate was not in recess on that date because it had convened in a pro forma session on January 3 and was scheduled to convene in another pro forma session on January 6.

The court of appeals ruled that the three challenged NLRB members had not been validly appointed but did so based on an interpretation of the Recess Appointments Clause that had not been advanced by Noel Canning or by its principal amici. *See* D. C. Cir. Oral Arg. Tr. 10 & 25 (asking first the petitioner and then an amicus for petitioner why they had not advanced the interpretation ultimately adopted by the court of appeals). The court of appeals first held unanimously that the President can exercise his recess appointment authority only during the recesses that occur between sessions of Congress. Pet. App. 34a. Since the January 4, 2012 appointments were made after the second session of the 112th Congress had begun, the court held that the

appointments were invalid on that basis. A majority of the court of appeals panel further held that the President may exercise his recess appointment authority to fill only those vacancies that first arise during the intersession recess in which the appointments are made. The panel majority held that the three vacancies filled by the January 4, 2012 appointments did not arise during the recess and that the appointments were invalid on that basis as well.

SUMMARY OF ARGUMENT

The Recess Appointments Clause provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. The first two questions presented by this case are interpretative: i) whether the phrase "the Recess of the Senate" includes both inter- and intrasession recesses of the Senate; and ii) whether the prepositional phrase "during the Recess of the Senate" describes when "the President shall have the Power to fill up all Vacancies" as opposed to describing when the vacancies that he may fill must first arise. The third question involves application of the Recess Appointments Clause, as properly construed, to the particular recess appointments at issue in this case.

Taking up each question in turn, we show first that, consistent with the long-settled mutual understanding of both the Senate and the President, the President may exercise his recess-appointment power during lengthy recesses of the Senate,

whether those recesses occur during or between sessions, and he may exercise that authority to fill all vacancies that exist during such recesses, including vacancies that first arose prior to the recess. We then show that – in accordance with this settled and correct interpretation of the Recess Appointments Clause – the Senate was in recess when the appointments at issue here were made, because those appointments were made in the midst of an extended period during which the Senate was bound to conduct *no* business and *no* Senator, aside from the Acting President Pro Tempore, had a duty to be in attendance.

ARGUMENT

I. THE RECESS APPOINTMENTS CLAUSE GRANTS THE PRESIDENT THE POWER TO FILL VACANCIES DURING INTRASESSION RECESSES OF THE SENATE.

The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States." Art. II, Sec. 2, cl. 2. At the same time, the Constitution also provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate" on a temporary basis without the Senate's advice and consent. Art. II, Sec. 2, cl. 3.

The first interpretative question presented here is whether the term "the Recess of the Senate" in the Recess Appointments Clause is limited to "intersession" recesses or includes both "intersession" and "intrasession" recesses. We address that question in

two steps. First, we contrast the definition of "the Recess of the Senate" articulated by the Executive Branch and the Senate with the definition of that phrase articulated by the court below. Second, we consider the proper weight to be given the concrete application of that definition by the extended practice of the Executive Branch in making intrasession recess appointments and the Senate's acquiescence in that practice.

A. The President and the Senate have long agreed that "[t]he word 'recess' is one of ordinary, not technical, signification, and it is evidently used in the constitutional provision in its common and popular sense." S. Rep. No. 4389, 58th Cong., 3d Sess. 1 (1905), reprinted in 39 Cong. Rec. 3823-24 (1905). The President and the Senate have also long agreed that in determining whether a "recess" has occurred in that "common and popular sense," *ibid.*, "the real question . . . is whether in a *practical* sense the Senate is in session so that its advice and consent can be obtained." *Executive Power-Recess Appointments*, 33 Op. Att'y Gen. 20, 21-22 (1921) (emphasis in original). This "practical construction" was first articulated in "the report of the Senate Judiciary Committee presented on March 2, 1905." *Id.* at 25, citing S. Rep. No. 4389. And, under that construction, "the essential inquiry" in determining whether there is a "Recess of the Senate" is the following:

> "Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making

appointments?" 33 Op. Att'y Gen. at 25 ("paraphas[ing] the very language of the Senate Judiciary Committee Report").[1]

The conclusion reached by the court below "that 'the Recess' is limited to intersession recesses," Pet. App. 34a, rests on an understanding of the term "the Recess of the Senate" that is fundamentally at odds with the Executive Branch and Senate's understanding. According to the court of appeals, "'the Recess' . . . [i]s something different than a generic break in proceedings," *id.* at 20a, as the term "refers to a specific state of the legislature," *id.* at 31a, which the Senate can enter only by "conclud[ing] its session[] . . . with an adjournment *sine die*," *id.* at 47a. *See id.* at 50a ("Because the Senate did not adjourn *sine die*, it did not enter 'the Recess' . . . ."). Significantly, the court observed that, on this definition, the Senate can enter into a "momentary intersession recess." *Id.* at 48a n. 2.

The lower court's conclusion that "the Recess," as the term is used in the Recess Appointments Clause, "refers to a specific state of the legislature," Pet. App. 31a, achieved through the adoption of a particular form of adjournment resolution, *id.* at 47a, cannot be

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[1] The relevant language from the 1905 Senate Report is:

"It means, in our judgment, in this connection the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments." S.Rep. No. 4389, at 2 (emphasis omitted).

squared with the expressed understanding of the Executive Branch and the Senate as to the meaning of the phrase "Recess of the Senate." Contrary to the court below, the long-held understanding of the Executive Branch and the Senate is that

> "the test for determination of whether an adjournment constitutes a recess in the constitutional sense is not the technical nature of the adjournment resolution, i.e., whether it is to a day certain (temporary) or *sine die* (terminating the session), but its practical effect: *viz.*, whether or not the Senate is capable of exercising its constitutional function of advising and consenting to executive nominations," *Recess Appointments*, 41 Op. Att'y Gen. 463, 466-67 (1960).

In sum, the definition of "Recess of the Senate" articulated by both the Senate and the Executive Branch focuses solely on whether the Senate is absent for a lengthy period and thus unavailable to give its advice and consent on nominations. That definition draws no distinction between "intersession" and "intrasession" recesses. Indeed, the Senate and the Executive Branch have both expressly rejected the notion that whether there is a "recess" turns on any such technicality.

B. Neither the terms of the Recess Appointments Clause nor its early applications provide decisive guidance on whether a distinction should be drawn between inter- and intrasession recesses of the Senate. *See NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203, 226 (3d Cir. 2013) ("[R]ecess had at least two meanings at the time of

ratification: either intersession breaks only or intersession breaks plus long intrasession breaks."); *NLRB v. Enterprise Leasing Co.*, ___ F.3d ___, 2013 WL 3722388, at *36 (4th Cir. 2013) ("[T]he textual evidence is inconclusive."); *id.* at *49 (concurring opinion)("The Constitution does not define 'the Recess,' and we find no discussion of the Recess Appointments Clause at the Constitutional Convention in Philadelphia or the state ratifying conventions."). This absence is due to the fact that the question of whether the President's recess appointment authority extends to intrasession recesses of the Senate was irrelevant until the late nineteenth century. Before the 1860s, the Senate did not take long intrasession breaks. S. Pub. 112-12, *Official Congressional Directory, 112th Congress* 525 (2011). Indeed, the Senate only began regularly taking long intrasession recesses after 1934, when the adoption of the Twentieth Amendment changed the date on which annual sessions of Congress begin. *Id.* at 528-38. *See New Vista*, 719 F.3d at 265-66 n. 25 (dissenting opinion).

Once lengthy intrasession recesses did become common, however, the President and the Senate quickly reached a common understanding that the President had authority to unilaterally fill vacancies during lengthy intrasession breaks. The first long intrasession recesses occurred in the 1860s, and during these breaks President Johnson made several recess appointments, which were found to be within his authority. *Gould v. United States*, 19 Ct. Cl. 593, 595-96 (1884). In the period since the Twentieth Amendment changed the Senate's schedule, hun-

dreds of intrasession recess appointments have been made by virtually every sitting President with no expression of opposition from the Senate as a body.[2] *See* Henry B. Hogue, *Intrasession Recess Appointments*, Cong. Res. Serv. 3-4 (2004); Henry B. Hogue, et al., *The* Noel Canning *Decision and Recess Appointments Made From 1981-2013*, Cong. Res. Serv. 22-28 (2013); *Nippon Steel Corp. v. International Trade Comm'n*, 239 F.Supp.2d 1367, 1374 n. 13 (Ct. Int'l Trade 2002) (noting "the long history of the practice (since at least 1867) without serious objection by the Senate"). Indeed, "the Comptroller General[,] an officer in the legislative branch," has expressed "his full concurrence in the position taken by the Attorney General in 33 Op. 20." 41 Op. Att'y Gen. at 469 citing *Appointments – Recess Appointments*, 28 Comp. Gen. 30, 35-37 (1948).

The construction of the term "the Recess of the Senate" long embraced by the Executive Branch and the Senate better achieves the purpose of the Recess Appointments Clause than the construction of that term embraced by the court below. The Recess Appointments Clause indisputably was intended to fulfill the following purpose:

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[2] From time to time, individual Senators have expressed agreement with the interpretation adopted by the court below. For instance, Senator Kennedy submitted a brief in *Evans v. Stephens*, 387 F. 3d 1220 (11th Cir. 2004), arguing that President Bush's recess appointment of Judge Pryor was invalid on this ground. But the Senate itself, which does have the capacity to file briefs in its own name, has never adopted that position. *See* D.C. Cir. Tr. 20-21 (where Judge Griffith describes the mechanism by which the Senate decides to file a brief).

> "that, whensoever a vacancy shall exist which the public interests require to be immediately filled, and in filling which, *the advice and consent of the Senate cannot be immediately asked, because of their recess*, the President shall have the power of filling it by an appointment to continue only until the Senate shall have [had an opportunity to] pass[] upon it." *Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. 631, 632 (1823) (emphasis added).

The President and Senate's construction allows the President to make recess appointments during periods when the Senate's advice and consent cannot be asked and *only during such periods*. "Under the intersession definition," by contrast, the President "could recess appoint . . . officers during intersession breaks that last negligible periods of time." *New Vista*, 719 F.3d at 244. *Accord Enterprise Leasing*, 2013 WL 3722388, at *44 ("[T]he intersession definition . . . allows for a recess appointment during a momentary intersession break."). *See* Pet. App. 48a n. 2 ("momentary intersession recess"). Thus, the construction adopted by the court below would deprive the President of authority to make recess appointments during lengthy periods when the Senate is away and unavailable to consider nominations but would allow him to make such appointments during momentary breaks when the Senate is, as a practical matter, available to give its advice and consent.

This "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress," of making intrasession recess appointments should

"be treated as a gloss on 'executive Power' vested in the President by . . . Art[icle] II." *Youngstown Steel Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (concurring opinion). As Justice Frankfurter aptly observed,

> "[T]he content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjoined. The Constitution is a framework for government. Therefore the way the frame work has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution . . ., but they give meaning to the words of a text or supply them." *Id.* at 610.

For just this reason, "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

This is not to say that the practice of the Executive Branch and the Senate with regard to intrasession recess appointments "supplant[s] the Constitution." *Youngstown Steel*, 343 U.S. at 610. But it is most certainly to say that the conclusion reached by the Executive Branch and the Senate regarding the proper interpretation of the Recess Appointments Clause – based on their experience in exercising the appointment authority assigned to those two branches of government by the Constitution – is entitled to respect from the

Judiciary.[3] Moreover, "the way the framework [for recess appointments] has consistently operated" should be viewed as "fairly establish[ing] that it has operated according to its true nature." *Ibid.*

Aside from admittedly inconclusive textual analysis and historical research, the proponents of the "intersession" interpretation of "Recess of the Senate" have advanced two policy reasons for rejecting the Executive Branch and Senate's definition of that term. Neither policy reason is sufficient to justify rejecting the views of the Executive Branch and the Senate on this matter.

The principal policy reason advanced in support of narrowly construing the phrase "Recess of the Senate" is that it serves "to preserve the Senate's advice-and-consent power by limiting the president's unilateral appointment power." *New Vista*, 719 F.3d at 229. *See also id.* at 235. *Enterprise Leasing*, 2013 WL 3722388, at *49 (concurring opinion) ("maintain[] the separation of powers by cabining the President's unilateral appointments power to limited circumstances"). *See also id.* at *40. There is every indication, however, that the Senate does not need the Judiciary's help in this regard.

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[3] What is at issue here is the weight to accord the President and the Senate's interpretation of the constitutional provisions defining the respective authority of each of those branches of government with regard to appointments. Contrary to the view of the court below, Pet. App. 24a-25a, the situation here is thus at the furthest remove from that addressed in *INS v. Chadha*, 462 U.S. 919, 945 (1983), where the question was whether a potentially "useful 'political invention'" could trump "[e]xplicit and unambiguous provisions of the Constitution."

In the first place, the drafters of the Constitution protected the Senate's prerogatives by providing that recess appointments can last no longer than a full session of Congress. The temporary nature of such appointments creates a powerful incentive for Presidents to seek confirmation of their nominees to full terms. Precisely because he "has no assured tenure beyond the next session of the Senate," a recess appointee will feel constrained to carry out his functions "with one eye over his shoulder on Congress." *United States v. Woodley*, 751 F.2d 1008, 1014 (9th Cir. 1985) (*en banc*) (dissenting opinion) (quotation marks and citation omitted). That is obviously an undesirable state of affairs for a President who wishes to staff the Executive Branch with officers who will vigorously advance the administration's program.

What is more, the Congress has taken steps to protect the Senate's prerogatives by enacting the Pay Act. *See* 5 U.S.C. § 5503. This statute provides that recess appointees will not be paid for their services, except in three sets of circumstances where it would have been very difficult to procure the advice and consent of the Senate in filling the vacancy. *Id.* § 5503(a). And, the statute further provides that where vacancies are filled by permitted recess appointments, the Senate must be promptly presented with a nominee for its consideration. *Id.* § 5503(b).

Finally, and most importantly, the "intersession" interpretation is, in fact, particularly ill-suited to protecting the Senate's interests in this regard. This is so, because that interpretation "allows for a recess appointment during a momentary intersession

break," *Enterprise Leasing*, 2013 WL 3722388, at *44, Pet. App. at 48a n.2, and would thus permit the President to make recess appointments even on days when the Senate is sitting and unquestionably available to give its advice and consent.

The authors of the 1905 Senate Report would not have agreed that allowing the President to make recess appointments during "intersession breaks that last negligible periods of time," *New Vista*, 719 F.3d at 244, "preserve[s] the Senate's advice and consent power," *id.* at 229. It was exactly that sort of thing that the Senate Report meant to preclude by declaring that the term "recess," within the meaning of the Recess Appointments Clause, does *not* include any period "when the Senate is in position to receive a nomination by the President, and, therefore, to exercise its function of advice and consent." S. Rep. No. 4389, at 3. The course of events that generated the 1905 Senate Report makes this crystal clear.

In 1901, Attorney General Knox advised President Roosevelt that "[t]he interval between the[] two sessions [of Congress] is *the* recess" during which the President could make appointments pursuant to the Recess Appointments Clause. *President – Appointment of Officers – Holiday Recess*, 23 Op. Att'y Gen. 599, 604 (1901) (emphasis in original).[4] Acting on this advice, President Roosevelt made a large number of appointments during the moment

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[4] By contrast, Attorney General Knox opined, "[a]ny intermediate temporary adjournment is not such recess, although it may be *a* recess in the general and ordinary use of that term." *Id.* at 601 (emphasis in original).

between the end of the first session and the beginning of the second session of the 58th Congress on December 7, 1903. *See* 38 Cong. Rec. 1438-39 (1904) (listing the recess appointments to military positions). *See also* Vivian S. Chu, *Recess Appointments: A Legal Overview*, Cong. Res. Serv. 8 (2011).[5] President Roosevelt treated the brief period between the two sessions as a "recess" during which he had power to make recess appointments.

Four days after President Roosevelt made these recess appointments, Senator Tillman submitted a resolution calling upon the Senate Judiciary Committee to report on "[w]hat constitutes a 'recess of the Senate'" for purposes of the Recess Appointments Clause. 38 Cong. Rec. 113 (1903). The Senate Judiciary Committee issued its report on March 2, 1905. S. Rep. No. 4389, 58th Cong., 3d Sess. (1905), reprinted in 39 Cong. Rec. 3823-24 (1905). Rejecting the interpretation on which President Roosevelt acted, the Senate Report concluded that "[t]he word 'recess' is one of ordinary, not technical, signification, and it is evidently used in the constitutional provision in its common and popular sense." *Id.* at 1. The Senate continues to treat the 1905 Report as the definitive statement of "what constitutes a 'recess of the Senate'" within the meaning of the Recess Appointments Clause. Floyd M. Riddick

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[5] At noon on that date, the President pro tempore of the Senate adjourned the first (extra) session of the 58th Congress sine die, left the chair, went down to the floor and returned with the Chaplain, who began the second session of that Congress with a prayer. *See* 38 Cong. Rec. 1605 (1904) (recollecting the events).

& Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices* 1084 (1992).

In short, it could not be more clear that the Senate has concluded – and wisely so – that the technical interpretation of the phrase "the Recess of the Senate" disserves the Senate's ability to give its advice and consent on nominations.

The other policy reason advanced in favor of the technical construction is that it provides "standards" that "are judicially manageable." *New Vista Nursing*, 719 F.3d at 217. *See* Pet. App. 28a ("favor[ing] the clarity of the intersession interpretation"); *Enterprise Leasing*, 2013 WL 3722388,, at *39 ("[T]he unavailable-for-business definition offers no durational guideposts.") & *50 (concurring opinion) ("a more judicially manageable interpretation of 'the Recess'"). Finding a "judicially manageable" interpretation is not a weighty consideration, however, since there have been few occasions when judicial supervision has been needed. The appointment process has been assigned to the President and the Senate. *See* Alexander Hamilton, *The Federalist No. 76* ("The Appointing Power of the Executive."). And, the President and the Senate have concluded that the practical construction offers the most manageable standard for their purposes. *See, e.g.*, *Intrasession Recess Appointments*, 13 Op. O.L.C. 271, 272-73 (1989). Those are the two branches of government directly assigned responsibility for the appointment process, and their views on what is the most manageable standard for carrying out their constitutionally assigned responsibilities is entitled to great weight.

This Court should embrace the Executive Branch and Senate's construction of the phrase "the Recess of the Senate." On that understanding, a "Recess of the Senate" occurs whenever the Senate's "adjournment [is] of such duration that the members of the Senate owe no duty of attendance" with the result that "the Senate [is] absent so that it can not receive communications from the President or participate as a body in making appointments." 33 Op. Att'y Gen at 25, paraphrasing S. Rep. No. 4389.

II. THE PRESIDENT HAS THE POWER TO FILL UP ALL VACANCIES DURING THE RECESS OF THE SENATE, REGARDLESS OF WHEN THOSE VACANCIES FIRST AROSE.

The second interpretative question presented by this case is whether the President may fill vacancies that first occur prior to the recess in question. Consistent with the text of the Recess Appointments Clause, the common understanding of the President and the Senate has long been that the President may fill such vacancies.

The critical textual question in this regard is the application of the prepositional phrase "during the Recess of the Senate." Grammatically speaking, that phrase can be read to describe the period during which the President possesses the power to fill vacancies, i.e., that phrase can be understood to modify "shall have Power." Or that prepositional phrase can be read to describe when the vacancies that may be so filled must arise, i.e., that phrase can be understood to modify "all Vacancies that may hap-

pen." Prior to the decision below, the universally accepted interpretation was that the President has the power to unilaterally fill vacancies only "during the Recess of the Senate" but that during that period the President has the power to fill up all existing vacancies.

This interpretation of the Recess Appointments Clause was articulated nearly two hundred years ago by Attorney General Wirt in an opinion concluding that the recess appointment power of the President extends to filling vacancies that first occurred prior to the Senate beginning its recess. *See* 1 Op. Att'y Gen. at 632. Attorney General Wirt set forth the common sense of this interpretation as follows:

> "In reason, it seems to me perfectly immaterial when the vacancy first arose; for, whether it arose during the session of the Senate, or during their recess, it equally requires to be filled. The constitution does not look to the moment of the origin of the vacancy, but to the state of things at the point of time at which the President is called on to act." 1 Op. Att'y Gen. at 633.

As the Eleventh Circuit observed, Congress has expressed its agreement with this interpretation of the Recess Appointments Clause by passing a law addressed to the "salary requirements for officers appointed to fill a vacancy that existed while [the] Senate was in session." *Evans*, 387 F.3d at 1226 (describing 5 U.S.C. § 5503). *See also Appointments – Recess Appointments*, 28 Comp. Gen. at 33 (interpreting the Pay Act to "permit the payment of persons appointed to fill offices requiring Senatorial

confirmation during periods while the Senate was not in session, if nominations had been submitted during the session of the Senate and not acted upon"). And other than the court below, every federal court addressing the question has also expressed agreement with this interpretation. *See Evans*, 387 F.3d at 1226-27; *Woodley*, 751 F.2d at 1012-13; *United States v. Allocco*, 305 F.2d 704, 710-12 (2d Cir. 1962).

The majority below attributed great significance to the fact that, during the three month period between the first and second session of the first Congress, President Washington made four recess appointments to fill vacancies that had been created when appointees who had been nominated and confirmed near the end of the first session later declined their appointments. Pet. App. 38a-39a. The majority asserted that this episode indicates that President Washington engaged in a "convoluted process" to ensure that vacancies would arise during the recess. *Id.* at 39a. And, the lesson the majority drew from this was that President Washington understood his recess appointment authority to extend only to vacancies that first occurred during a recess. *Ibid.* The historical truth refutes rather than supports that hypothesis.

In late September 1789, during the last days of the first session of the first Congress, President Washington nominated and the Senate confirmed no fewer than ninety-five judges and officers. S. Exec. J., 1st Cong., 1st Sess., 29-35 (1789). When the second session was convened in February 1790, President Washington immediately informed the

Senate that five of the ninety-five nominees confirmed at the very end of the term had declined their appointments. S. Exec. J., 1st Cong., 2d Sess., 38 (1790).[6] President Washington explained to the Senate that he had filled the four district court vacancies by making recess appointments but that he had not filled the vacancy on the Supreme Court left by Robert Harrison's refusal of his appointment. *Ibid.* At the same time, President Washington submitted the nominations of the four individuals he had recess appointed for the Senate's advice and consent. *Ibid.*[7]

The only conclusion that can be drawn from this episode is that President Washington and the Senate were endeavoring – largely with success – to fill

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[6] At the same time, President Washington also informed the Senate that three nominees who had been confirmed as port officers in August 1789 had declined their appointments but that he had not filled these vacancies by making recess appointments. *Ibid.* *See* S. Exec. J., 1st Cong., 1st Sess., at 9-11 (listing the August nominees).

[7] On March 30, 1790, President Washington informed the Senate that a sixth appointee who had been confirmed in September 1789 had declined his position as the United States attorney for Kentucky. S. Exec. J., 1st Cong., 2d Sess., at 42. On September 24, 1796, President Washington finally filled that long-vacant position by making a recess appointment. Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky 1789-1816*, at 73 & n. 83 (1978). *See also id.* at 65-72 (detailing Washington's seven attempted and failed appointments to fill the position between 1792 and 1796). President Washington's action in this regard tends to confirm Attorney General Wirt's understanding that pre-existing vacancies could be filled by the President during a recess.

vacancies in the new government with confirmed appointees. There is no indication that the President and the Senate were attempting to manufacture vacancies during the up-coming recess. To the contrary, in correspondence during that recess, President Washington complained that the decisions by a handful of the confirmed nominees to decline their appointments would "have a tendency to bring the Government into discredit" and had "embarrassed" him personally. Letter from George Washington to James McHenry (Nov. 30, 1789) & Letter from George Washington to Edmund Randolph (Nov. 30, 1789), in 30 *The Writings of George Washington* 470 & 472 (John C. Fitzpatrick ed., 1939).

In sum, the long-held view of the Executive and Legislative branches that the President has the power to fill *all* vacancies that exist during a recess of the Senate should be accepted as the correct interpretation of the Recess Appointments Clause.

III. UNDER THE PRESIDENT AND SENATE'S INTERPRETATION OF THE RECESS APPOINTMENTS CLAUSE, THE SENATE WAS IN RECESS ON JANUARY 4, 2012.

In terms of the "essential inquiry" delineated in the 1905 Senate Report and long accepted by the Executive Branch, there was clearly a "Recess of the Senate" when the appointments in question here were made. 33 Op. Att'y Gen. at 25. The appointments were made on January 4, 2012 in the midst of a five week period during which "the members of the

Senate owe[d] no duty of attendance[,] . . . its chamber [was] empty[, and] the Senate [was] absent so that it c[ould] not receive communications from the President or participate as a body in making appointments." *Ibid.*

On December 17, 2011, in preparation for what was referred to as "the upcoming recess or adjournment of the Senate," the Senate adopted by "unanimous consent," "[o]rders [f]or Tuesday, December 20, 2011 [t]hrough Monday, January 23, 2012." 157 Cong. Rec. S8783 (daily ed., Dec. 17, 2011). The unanimous consent orders provided that "when the Senate completes its business today, it [will] adjourn and convene for pro forma sessions only, with no business conducted on the following [specified] dates . . . until 2 p.m. on Monday, January 23," when, "following the prayer and pledge" and other opening formalities, "the Senate [would] be in a period of morning business until 4 p.m. . . . and that following morning business, the Senate [would] proceed to executive session." *Id.* at S8783-84.

The unanimous consent agreement was a binding commitment not to conduct business between December 17 and January 23, including at the scheduled "pro forma" sessions. This is so, because "in cases in which the Senate has agreed not to conduct business at a pro forma session," it has bound itself not to do so and may conduct business during the covered period only if it "subsequently adopt[s] a second consent agreement which would permit [it to] do so." Christopher M. Davis, Cong. Res. Serv., *Memorandum to Senate Minority Leader* (March 8, 2012), reprinted in 158 Cong. Rec. S5954 (daily ed.,

Aug. 2, 2012).[8] *See Riddick's Senate Procedure*, at 1313 ("A unanimous consent agreement can be set aside by another unanimous consent agreement.").

In this regard, "an order by unanimous consent which specifies that [the covered] series of meetings is to be pro forma and that no legislative business is to be conducted on such days," 158 Cong. Rec. at S5954, is *more restrictive* than the typical concurrent resolution adjourning Congress. The typical adjournment resolution allows the Senate to be recalled by the majority leader or his designee to conduct business in whatever way the Senate sees fit. *See* S. Con. Res. 1, 112th Cong., 1st Sess. (Jan. 5, 2011). In the face of a unanimous consent agreement not to do business, by contrast, the Senate can act *only* by unanimous consent, and thus a single Senator can block it from doing business. For precisely this reason, the *Congressional Directory* – a publication of the Legislative Branch – has consistently characterized such periods of "pro forma sessions" where "no business is conducted" as "recesses." *Congressional Directory*, at 538 n. 2.

By providing that the Senate would "convene for

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[8] The Congressional Research Service memorandum attempts to draw a distinction between situations in which "the Senate has . . . agreed not to conduct business during pro forma sessions," and "a pro forma session" held without such an agreement. *Ibid.* The CRS memorandum suggests that the Senate could "conduct legislative or executive business" at the latter. *Ibid.* Since the Senate *did* agree not to conduct business during the period in question here, the significance of designating sessions as "pro forma" in the absence of an agreement to conduct no business is not an issue in this case.

pro forma sessions only, with no business conducted," 157 Cong. Rec. at S8783, the unanimous consent agreement freed the Senators from their "duty of attendance," with the predictable consequence that "its chamber [was] empty," 33 Op. Att'y Gen. at 25. "Under Senate Rule VI, paragraph 2, Senators are required to attend all sessions of the Senate unless they are excused." *Riddick's Senate Procedure*, at 214. But this rule is enforced only "[w]hen a quorum call is had and a quorum fails to respond." *Ibid.* And the presence of a "quorum" is only relevant to "the valid transaction of business." *New Process Steel v. NLRB*, 560 U.S. ___, 130 S.Ct. 2635, 2642 (2010). Thus, the unanimous consent agreement to "convene for pro forma sessions only, *with no business conducted*," 157 Cong. Rec. at S8783 (emphasis added), provided assurance that there would be no quorum call during the covered period. *See Riddick's Senate Procedure*, at 1042 ("A quorum call is not in order unless business has intervened since a quorum was last established . . . ."). As a result, other than the presence of the acting President pro tempore for less than a minute each session, the Senate chamber was empty during the "pro forma sessions."

From the Senate's "recess or adjournment" on December 17, 2011, 157 Cong. Rec. at S8783, until that body came "back after the long break" on January 23, 2012, 158 Cong. Rec. S13 (daily ed., Jan. 23, 2012), the Senate did not meet in any regular session or – with one exception – conduct any business. The single exception occurred on December 23, 2011, when the Senate, acting by "unanimous consent agreement," adopted a two month extension of

various tax reductions that had been passed by the House, and then returned to being governed by "the previous order." 157 Cong. Rec. S8789-90 (daily ed., Dec. 23, 2011).[9] On every other day covered by the unanimous consent agreement, the pro forma sessions were opened without any of the usual formalities and adjourned only seconds later. *See* 157 Cong. Rec. S8787 (daily ed., Dec. 20, 2011) (35 seconds); *id.* at S8791 (daily ed., Dec. 27, 2011) (30 seconds); *id.* at S8793 (daily ed., Dec. 30, 2011) (32 seconds); 158 Cong. Rec. S1 (daily ed., Jan. 3, 2012) (41 seconds); *id.* at S3 (daily ed., Jan. 6, 2012) (29 seconds); *id.* at S5 (daily ed., Jan. 10, 2012) (28 seconds); *id.* at S7 (daily ed., Jan. 13, 2012) (30 seconds); *id.* at S9 (daily ed., Jan. 17, 2012) (28 seconds); *id.* at S11 (daily ed., Jan. 20, 2012) (29 seconds).

Communications from the President to the Senate made during this period were not placed before the Senate until the recess concluded on January 23. 158 Cong. Rec. S37 (daily ed., Jan. 23, 2012) (receiving a communication dated January 12, 2012). That being so, it was only when the Senate returned to business on January 23, 2012 that "the Presiding Officer laid

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[9] The fact that, acting by unanimous consent, the Senate did override the "Orders for Tuesday, December 20, 2011 through Monday, January 23, 2012" to conduct business at the December 27, 2011 session limited to passing an extension of the tax reduction does not make the period in question any less of a recess. The Senate could convene for a day to take exactly the same kind of action during the recess period set by a typical concurrent resolution adjourning both houses of Congress. *See, e.g.*, S. Con. Res. 1, 112th Cong., 1st Sess. (Jan. 11. 2011).

before the Senate messages from the President of the United States submitting sundry nominations." *Ibid.* Prior to that date, "the Senate [was] absent so that it c[ould] not receive communications from the President or participate as a body in making appointments." 33 Op. Att'y Gen. at 25.

The Senate itself all but declared that there was a "Recess of the Senate" for the period in question. To begin with, the Senate considers the 1905 report of the Committee on the Judiciary to be the authoritative source for "what constitutes a 'recess of the Senate'" for purposes of defining "what are the powers and limitations of the President in making appointments in such cases." *Riddick's Senate Procedure*, at 1084. By binding itself to "convene for pro forma sessions only, with no business conducted," 157 Cong. Rec. S8783, the Senate guaranteed that its long break would constitute a "recess of the Senate" as that phrase was defined by the 1905 Senate Report.

The authoritative 1905 Senate Report expressly rejects the proposition that the convening of "constructive sessions" is of any relevance in determining whether there is a "Recess of the Senate." S. Rep. No. 4389, at 2. As we have explained, the 1905 Report was commissioned by the Senate in response to President Roosevelt's appointment of a large number of officers during a "constructive recess" between the end of the first session and the immediate beginning of the second session of the 58th Congress at noon on December 7, 1903. The 1905 Report observed that "[i]t would seem quite as natural that there should be a 'constructive session' of Congress

or of the Senate as a 'constructive recess." *Ibid.* And, the Report rejected the notion that either would count in determining whether there was a "Recess of the Senate" on the ground that it was "intended by the framers of the Constitution that it should mean something real, not something imaginary." *Ibid.*

What is more, the Senate would have been aware that periods in which it convenes only "pro forma" sessions are classified as "recesses" by the *Congressional Directory*, a publication of the legislative branch. *Congressional Directory*, at 538 n. 2. And, the resolutions adopted by the Senate to govern various administrative matters during the period in question referred to that period as "the upcoming recess or adjournment of the Senate." 157 Cong. Rec. S8783. *See also* 158 Cong. Rec. S13 (welcoming the Senators "back after the long break").[10]

Against that background, the President's determination that there was "a real and genuine recess" of the Senate during the "long break" in Senate proceedings for the period surrounding the January 4, 2012 appointments represents a reasonable application of the long-accepted definition of a "Recess of the Senate" to the undisputed facts and circumstances regarding the state of proceedings in the Senate at

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[10] The House likewise understood that the Senate was adjourning for the year on Saturday afternoon, December 17, 2011. *See, e.g.*, 157 Cong. Rec. H9932 (daily ed., Dec. 19, 2011) ("Over the weekend, . . . Senate liberals led adjournment for recess."); *id.* at H9954 (daily ed., Dec. 20, 2011) ("Saturday afternoon, Senator McConnell gave his consent to allow the Senate to adjourn for the year.").

that time. In exercising his authority to make recess appointments, "the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate." 13 Op. O.L.C. at 272 (quoting 33 Op. Att'y Gen. at 25). *Accord* 28 Comp. Gen. at 36. That being so, the President's appointments should be sustained by this Court.

CONCLUSION

The decision of the court of appeals should be reversed and the decision of the National Labor Relations Board should be enforced.

Respectfully submitted,

BRADLEY T. RAYMOND
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5337

Of counsel:

LAURENCE GOLD
805 Fifteenth Street, N.W.
Washington, D.C. 20005

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

DEC
OFFICE

No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
NOEL CANNING,
A DIVISION OF THE NOEL CORP.,
and
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 760,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760 IN SUPPORT OF THE PETITIONER NATIONAL LABOR RELATIONS BOARD

BRADLEY T. RAYMOND
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5337

Of counsel:

LAURENCE GOLD
805 Fifteenth Street, N.W.
Washington, D.C. 20005

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REPLY BRIEF FOR RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760 IN SUPPORT OF THE PETITIONER NATIONAL LABOR RELATIONS BOARD

The decision below would, as a practical matter, nullify the Constitution's grant to the President of the power to make recess appointments. The decision does so: first, by reading the Recess Appointments Clause as authorizing the President to fill vacancies only during the period between an adjournment *sine die* that ends one session of the Senate and the commencement of the Senate's next session – a period that, under the Senate's current practice, typically lasts for only a few days and not infrequently for only a few moments; and, second, by further limiting the President's power to filling only those vacancies that first arise during those short intersession breaks. While Noel Canning did not advocate that reading of the Recess Appointments Clause in the court below, the Company now defends that reading. In so doing, the Company fully embraces the radical reduction in the President's recess appointment power effected by the lower court's interpretation, asserting that the Clause is best treated as an historical relic of the era "[w]hen Senators dispersed by horseback across the nation after the Session each year," Noel Canning Br. 1, having no present significance.

The Executive Branch and the Senate have taken a different view of the Recess Appointments Clause. For the past century, the political branches of government that share the appointment authority have structured their relations on the premise that the

Clause allows the President to fill vacancies during any prolonged break in the Senate's proceedings regardless of whether the Senate's adjournment order is *sine die* or to a day certain. And, for the last two centuries, the political branches have expressly agreed that the recess appointment power extends to filling all vacancies regardless of when they first arise. The political branches' interpretation represents a reasonable reading of the constitutional text in its historical context and better fulfills the obvious purpose of the Recess Appointments Clause than the interpretation of the court below. Under the interpretation long embraced by the political branches, the appointments at issue here were valid.

I. THE RECESS APPOINTMENTS CLAUSE GRANTS THE PRESIDENT THE POWER TO FILL VACANCIES DURING ANY RECESS OF THE SENATE THAT IS OF SUBSTANTIAL DURATION REGARDLESS OF THE FORM OF THE ADJOURNMENT ORDER.

The question of whether the President's recess appointment authority turns on the form of the Senate's adjournment order did not arise during the early years of the Republic for the simple reason that during that period practical considerations, such as the difficulty of travel and the peculiarities of the Senate's schedule, dictated that adjournments of any substantial duration be initiated by an adjournment *sine die*, terminating the current session. During the modern era, ushered in by the advent of modern modes of transportation and the adoption of the Twentieth Amendment, the Senate practice changed so that breaks of substantial duration were more commonly

initiated by adjournments to a day certain – which suspend rather than terminate a current session – rather than by adjournments *sine die*. Throughout this century-long period, all Presidents and the Senate have proceeded on the common understanding that the President has authority to fill vacancies during any adjournments of substantial duration, regardless of the form of the adjournment order.

In articulating their interpretation of the Recess Appointments Clause, the Executive Branch and the Senate began from the common understanding that "[t]he word 'recess' is one of ordinary, not technical, signification." S. Rep. No. 4389, 58th Cong., 3d Sess. 1 (1905). Based on that "ordinary, not technical" understanding of the term "recess," the political branches have agreed that

> "the test for determination of whether an adjournment constitutes a recess in the constitutional sense is not the technical nature of the adjournment resolution, i.e., whether it is to a day certain (temporary) or *sine die* (terminating the session), but its practical effect: *viz.*, whether or not the Senate is capable of exercising its constitutional function of advising and consenting to executive nominations," *Recess Appointments*, 41 Op. Att'y Gen. 463, 466-67 (1960).

Rejecting that view, the court below held that "'the Recess' . . . [i]s something different than a generic break in proceedings," Pet. App. 20a, in that the term "refers to a specific state of the legislature," *id.* at 31a, which the Senate can enter only by "conclud[ing] its session[] . . . with an adjournment *sine die*," *id.* at 47a. *See id.* at 50a ("Because the Senate did not adjourn *sine die*, it did not enter 'the Recess' . . . ."). Acting on

that understanding of the term "recess," the court below invalidated the appointments at issue in this case on the ground that the President made the appointments during a break initiated by an adjournment to a day certain rather than by an adjournment *sine die*. *Id.* at 34a-35a.

The "technical" interpretation of the term "recess" adopted by the court below disserves the purpose of the Recess Appointments Clause, which is indisputably to allow the President to fill vacancies while the Senate is away and thus unable to give its advice and consent on nominations. The interpretation of the court below would allow the President to fill vacancies during a "momentary intersession recess," Pet. App. 48a n. 2, even on a day when the Senate is sitting and fully available to take up nominations. At the same time, the lower court's interpretation would deny the President authority to fill vacancies during long breaks in Senate proceedings that do not commence with "an adjournment *sine die*." *Id.* at 47a. There is nothing in the text or history of the Recess Appointments Clause that justifies that result.

As a textual defense of the lower court's reading of the word "recess," Noel Canning argues that the Executive Branch and Senate's interpretation inconsistently "give[s] 'the Recess' its colloquial meaning . . . , while giving 'next Session' its formal meaning." Noel Canning Br. 6. This is a non sequitur. Unlike the term "Recess," the term "Session" appears elsewhere in the Constitution and clearly refers to formal Sessions as opposed to less formal periods of sustained proceedings. *See* Art. I, Sec. 5, cl. 4. Moreover, the established understanding does, in fact, give both terms "a *prac-*

tical sense." *Executive Power-Recess Appointments*, 33 Op. Att'y Gen. 20, 22 (1921) (emphasis in original). The term "Recess" is understood in the "practical" sense as a period of suspended proceedings sufficient in length that the Senate is not sitting "so that its advice and consent can be obtained." *Ibid* And, the term "Session," is likewise interpreted to ensure a subsequent period of proceedings sufficient in duration for the Senate to consider a permanent replacement for the recess-appointed officer and for that temporary office-holder to perform his or her duties.

Noel Canning's historical argument in support of the technical interpretation of the term "recess" merely confirms that in the era "[w]hen Senators dispersed by horseback," Noel Canning Br. 1, the Senate's practice – dictated entirely by practical circumstances – was to break for long periods between sessions and to meet continuously once a session had begun. There is nothing in the historical materials to suggest that the drafters of the Constitution intended to make the President's recess appointment authority turn on whether the Senate adjourned *sine die* or to a specified date. Nor is there anything to suggest that the drafters intended the President to be able to unilaterally fill vacancies during momentary intersession breaks. In short, the history says nothing about how the recess appointment authority might apply in the modern circumstances of very brief intersession breaks and relatively long intrasession recesses.

The interpretation of the term "recess" in the Recess Appointments Clause that has guided the Executive Branch and the Senate in exercising the appointment authority under the Constitution is en-

tirely reasonable and entitled to deference by this Court.

II. THE PRESIDENT HAS THE POWER TO FILL UP ALL VACANCIES DURING THE RECESS OF THE SENATE, REGARDLESS OF WHEN THOSE VACANCIES FIRST ARISE.

Compounding its error, the majority below read the Constitution's grant to the President of the "Power to fill up all Vacancies that may happen during the Recess of the Senate" as limited to only those vacancies that first arise during the recess. Pet. App. 51a. As Judge Griffith noted in explaining his refusal to join this part of the majority opinion, *id.* at 54a, the majority's interpretation flies in the face of two hundred years of authority from all three branches of government. *See Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. 631, 632-33 (1823). *Accord*, *Evans v. Stephens*, 387 F.3d 1220, 1226-27 (11th Cir. 2004) (*en banc*); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (*en banc*); *United States v. Allocco*, 305 F.2d 704, 710-12 (2d Cir. 1962); *Appointments – Recess Appointments*, 28 Comp. Gen. 30, 33 (1948).

Noel Canning defends the majority's interpretation by asserting that the established understanding makes the phrase "that may happen" largely superfluous. Noel Canning Br. 34-35. That is not so. The established understanding treats the entire phrase "all Vacancies that may happen" as meaning all vacancies whatsoever. In other words, adding "that may happen" performs a function in the phrase similar to adding the word "all" in front of "Vacancies"; both elaborations may be unnecessary but they do perform

the function of emphasizing that the President may fill all vacancies no matter how they arise.

In an effort to defend the majority's interpretation, Noel Canning asserts that the phrase "during the Recess of the Senate" modifies *both* when "the President shall have Power to fill up all Vacancies" *and* when the relevant "Vacancies . . . may happen." Noel Canning Br. 36 n. 26. But that reading is grammatically impossible, as any attempt to diagram the sentence would reveal. The phrase "during the Recess of the Senate" either describes when the President possesses the power to fill vacancies or it describes the type of vacancies he can fill, but it cannot describe both. Significantly, the majority opinion below does not attempt the ungrammatical reading advanced by Noel Canning and simply relies upon an implied limitation of the President's recess appointment authority to the period of the recess. Pet. App. 51a. In other words, in order to make sense of its interpretation, the majority found it necessary to add an implied limitation that, on its reading, would not appear in the text.

In its attempt to provide historical support for the majority's interpretation, Noel Canning repeats the assertion that President Washington followed a "convoluted process" to create vacancies during a Senate recess. Noel Canning Br. 37. But the Company only cites the usual secondary source for that charge and ignores altogether our demonstration from primary sources that President Washington was not trying to manipulate the creation of vacancies but rather to fill offices with confirmed appointees. IBT Local 760 Br. 20-21 & ns. 6-7.

Noel Canning has failed to advance sufficient tex-

tual or historical grounds for rejecting the established understanding that, "during the Recess of the Senate," the President has the "power to fill up all Vacancies that may happen," not just those vacancies that first arise during a recess.

III. UNDER THE PRESIDENT AND SENATE'S INTERPRETATION OF THE RECESS APPOINTMENTS CLAUSE, THE SENATE WAS IN RECESS ON JANUARY 4, 2012.

Under the "practical construction" of the Recess Appointments Clause first articulated in "the report of the Senate Judiciary Committee presented on March 2, 1905," i.e., S. Rep. No. 4389, *supra*, "the essential inquiry" in determining whether there is a "Recess of the Senate" is the following:

> "Is the adjournment of such duration that the members of the Senate owe no duty of attendance? Is its chamber empty? Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?" *Executive Power-Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921) ("paraphas[ing] the very language of the Senate Judiciary Committee Report").[1]

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[1] The relevant language from the 1905 Senate Report is:

"It means, in our judgment, in this connection the period of time when the Senate is not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments." S.Rep. No. 4389, at 2 (emphasis omitted).

From the Senate's "recess or adjournment" on December 17, 2011, 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011), until that body came "back after the long break" on January 23, 2012, 158 Cong. Rec. S13 (daily ed. Jan. 23, 2012), "the Senate [was] absent so that it c[ould] not receive communications from the President or participate as a body in making appointments," 33 Op. Att'y Gen. at 25. By agreeing to a unanimous consent order providing that the Senate would "adjourn and convene for pro forma sessions only, with no business conducted" during that period, 157 Cong. Rec. at S8783, "the members of the Senate [assured that they would] owe no duty of attendance" and that, thus, "its chamber [would be] empty," 33 Op. Att'y Gen. at 25.

In an attempt to refute this characterization of the "long break," Noel Canning asserts that "the Senate was fully capable of doing business at its pro forma sessions," because "the presiding Senator could have sought unanimous consent, heard no objection, and proceeded to pass legislation, confirm nominees, or exercise any other Senate power – just like at any other Senate session." Noel Canning Br. 60. This posit – that the presiding officer would determine "unanimous consent" from the silence of an empty chamber and unilaterally conduct the Senate's business – is so far-fetched as to be self-refuting.

Equally far-fetched is the Company's assertion that the duty of attendance might have been enforced by a Senator suggesting the absence of a quorum at the outset of one of the pro forma sessions for no apparent purpose other than calling the other Senators back to the chamber. Noel Canning Br. 63. As we have

demonstrated, both common sense and the Senate rules tie quorum calls to the conduct of business. IBT Local 760 Br. 25. Thus, during a period when the Senate has bound itself to conduct "no business" and to meet in "pro forma sessions only," the reasonable expectation is that there will be no quorum calls and thus the duty of attendance will not be enforced.

The extremes to which Noel Canning is driven in its attempts to show that during the "long break" the Senate could have conducted business and the duty of attendance could have been enforced only prove the opposite. Every Senator understood that the purpose and effect of the unanimous consent orders agreed to on December 17, 2011 was that the Senate would conduct no business until it reconvened on January 23, 2012 and that the duty of attendance would be unenforced throughout that period. As a result, the Senate was absent for that five week period.

Precisely because of this predictable understanding and result, the *Congressional Directory* – a publication of the Legislative Branch – has consistently characterized such periods of "pro forma sessions" where "no business is conducted" as "recesses." S. Pub. 112-12, *Official Congressional Directory, 112th Congress* 538 n. 2 (2011). The President's determination that he had authority to make recess appointments during such a period of Senate absence is thus entirely reasonable. *See Intrasession Recess Appointments*, 13 Op. O.L.C. 271, 272 (1989) ("[T]he President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate."). *Accord* 28 Comp. Gen. at 36.

CONCLUSION

The decision of the court of appeals should be reversed and the decision of the National Labor Relations Board should be enforced.

Respectfully submitted,

BRADLEY T. RAYMOND
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

JAMES B. COPPESS
(Counsel of Record)
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5337

Of counsel:

LAURENCE GOLD
805 Fifteenth Street, N.W.
Washington, D.C. 20005

REPLY BRIEF

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In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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In the Supreme Court of the United States

No. 12-1281

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent's contention that the President has no authority to make recess appointments during intra-session recesses of the Senate would repudiate the constitutional legitimacy of thousands of appointments made by at least 14 Presidents since the 1860s. Pet. Br. 21-27. And respondent's contention that the President may not make an appointment during a recess if the vacancy did not first arise during that same recess would likewise repudiate countless appointments made by at least 39 Presidents, including Washington, Jefferson, Madison, and Monroe. *Id.* at 35-44. Throughout our history, Presidents have made appointments in these circumstances to fill offices temporarily when the Senate was unavailable to provide its advice and consent, thereby ensuring that the laws would be faithfully executed. The Officers of the United States who have received such appointments have led armies in war, exercised Article III judi-

cial power, and taken innumerable actions affecting the lives, liberty, and property of the people.

Respondent asks this Court to overturn the long-settled construction of the Clause—and the equilibrium between the political Branches it reflects—to avoid "a virtually unlimited unilateral appointments power" and a descent into "'despotism.'" Resp. Br. 1-2. But history refutes respondent's rhetorical suggestion that the settled construction of the Clause subverts the constitutional design. In practice, the Clause has long functioned just as the Framers envisioned: as an auxiliary power that coexists comfortably with the Senate's advice-and-consent role to "produce a judicious choice of [persons] for filling the offices of the Union," *The Federalist No. 76*, at 510 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), without diminishing the President's accountability to the public for his appointees. It would take an exceptionally strong reason to overturn this settled construction and the centuries of historical practice undertaken in reliance on it. Respondent's arguments fall far short of justifying such a radical departure.

Respondent's final contention—that the Senate may rely on fleeting "pro forma sessions" to deny the President the power to make recess appointments, even though the Senate's Members have returned to their constituents and the body has officially announced that "no business" may be conducted (Pet. App. 91a)—would also profoundly change the constitutional design. Whatever the views of individual Senators, the Senate itself has not opined that pro-forma sessions preclude exercise of the recess-appointment power. And it is inconceivable that the Framers would have intended an empty ritual of this kind to bar the President from filling offices after the Senate's Members had dispersed to their often-

distant States even for months at a time, if the President believed such appointments were necessary for the defense of the fledgling Nation and the sound operation of its Government.

A. The President's Recess-appointment Authority Is Not Confined To Inter-session Recesses

In the 1780s, the term "recess" applied whether a break occurred *between* legislative sessions (*i.e.*, an inter-session recess initiated by an adjournment *sine die*) or *during* such a session (*i.e.*, an intra-session recess to a date certain). Pet. Br. 12-18. Since the 1860s, when Congress first took lengthy intra-session recesses, Presidents have made recess appointments during the majority of such recesses, accounting for literally thousands of appointments. *Id.* at 21-27. Respondent's contention that intra-session recesses do not even exist for purposes of the Recess Appointments Clause is unsupported by the constitutional text, original understanding, or purposes, and belied by long-standing practice.

1. The Framers' understanding of "recess" encompassed breaks that did not directly precede a new session

Respondent's principal contention (Br. 10-11, 15-16, 31) is that the terms "recess" and "session" refer to mutually exclusive periods, precluding the recognition of any "recess" within a "session" of the Senate, no matter how long the Senate remains away. Nothing in the text or original understanding categorically sets the two terms apart in the manner respondent asserts.

a. Thomas Jefferson recognized that "a recess by adjournment" did not end a legislative session (Thomas Jefferson, *A Manual of Parliamentary Practice* § LI, at 165 (2d ed. 1812) (*Jefferson's Manual*)), meaning it necessarily occurred during the "session." That was mani-

fest in British Parliamentary practice in the 1770s and 1780s, when the Speaker of the House of Commons used his statutory authority to issue warrants for replacing "such Members as shall die during the Recess of Parliament" even when deaths occurred during a recess-by-adjournment within a session.[1]

Respondent glimpses (Br. 21) its strict dichotomy between "the recess" and "the session" in Blackstone's explanation that a peer indicted for treason or felony would be tried by the Court of the Lord High Steward when Parliament was in recess but by the King in Parliament when it was in session. 4 William Blackstone, *Commentaries on the Laws of England* 258-260 (1769). But the Court of the Lord High Steward tried Lord Cornwallis for murder on June 30, 1678—during the recess that resulted when the House of Lords adjourned, without ending its session, from June 28 until July 1.[2] Blackstone's description therefore affirmatively supports the Executive's position here.

b. In America, when the Continental Congress took an intra-session recess in 1784, it exercised its authority to appoint the Committee of the States during "the recess of Congress." Pet. Br. 15. Respondent speculates (Br. 22 n.15) that Congress really meant to initiate an inter-session recess by adjourning to the date when the Articles of Confederation required a new session to begin. But Congress specified that it would reassemble two days sooner than that, "pursuant to" its adjourn-

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[1] See, *e.g.*, 35 H.C. Jour. 62 (1775); 38 *id.* at 100 (1781); 2 Sir Lewis Namier and John Brooke, *The House of Commons 1754-1790*, at 122, 216 (1964) (deaths of William Bromley Chester and Godfrey Bagnall Clarke).

[2] 7 T.B. Howell, *A Complete Collection of State Trials* 143 nn.* & † (1816); 13 H.L. Jour. 266 (1678).

ment resolution, not the Articles. 27 J. Continental Cong. 505 (Gaillard Hunt ed., 1928).

Respondent does not deny that on numerous occasions in the Founding era, including the Constitutional Convention itself, the terms "recess" and "the recess" were used to describe breaks following adjournments to dates certain, even in legislatures that had established practices of adjourning *sine die* (or leaving under equivalents). Pet. Br. 15-16.[3] Those examples are not undermined by occasional uses of "session" to refer colloquially to a group of daily meetings between lengthy adjournments to a date certain. Invoking such colloquial uses, respondent disregards the understanding that such recesses did not terminate the formal legislative session. See *Jefferson's Manual* § LI, at 166. And respondent erroneously attributes (Br. 22-23) that usage to legislatures that used a different term (like "sitting") to describe the meeting periods between lengthy adjournments. See, *e.g.*, N.J. Legis. Council J., 5th Sess. (1780-1781) (documenting several "sittings" within the annual "Session").[4]

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[3] See also, *e.g.*, 3 State Papers of Vermont 781 (P.H. Gobie Press, Inc., 1924) (1781 adjournment "without day"); 1 Journal of House of Representatives of Pennsylvania 390 (John Dunlap ed., 1782) (1779 legislature "rose without adjournment"); Massachusetts S. Journal, entry for July 6, 1781 (on file with Massachusetts Archives) (governor "prorogued" legislature).

[4] A similar informal usage underlies respondent's assertion that "'the phrase "the Recess" *always* referred to the gap between sessions.'" Resp. Br. 21 (quoting Robert G. Natelson, *The Origins and Meanings of "Vacancies that may happen during the Recess" in the Constitution's Recess Appointments Clause* 20 (Sept. 15, 2013), draft available at http://ssrn.com/abstract=2257801). Respondent's source (at 18) concludes that a "session" ended when the legislature's adjournment was not "relatively short." Under that

c. Although decades passed before there were regular intra-session recesses (Pet. Br. 21-22), congressional debate from the era on which respondent relies also demonstrates that a "recess" can occur during a "session." For example, in 1812, Senators described a proposed lengthy adjournment "during the present session" as a "recess." See, *e.g.*, 23 Annals of Cong. 212-216 (1812). By contrast, the Senate floor statements from 1814, 1830, and 1867 that respondent quotes (Br. 19-20) did not address the question, which is unsurprising as they arose in other contexts, before Congress routinely took lengthy intra-session recesses.

Respondent similarly errs in declaring (Br. 32) that a 1905 Senate Judiciary Committee Report "rejects the Executive's position." As that report arose in response to inter-session appointments, its failure to "acknowledge[] the possibility of recesses during the Session" (*ibid.*) is unremarkable. But its animating logic—that the Senate is in session when it is available to participate as a body in making appointments, and in recess when it is not—provides no ground for distinguishing between inter- and intra-session recesses, as Attorney General Daugherty recognized in 1921. S. Rep. No. 4389, 58th Cong., 3d Sess. 2 (1905) (*1905 Senate Report*); 33 Op. Att'y Gen. 20 (1921); Pet. Br. 24.[5]

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view (which respondent does not share), Congress has incorrectly numbered many sessions, and many extended Senate absences that have long been regarded as intra-session would be inter-session recesses. That view of "session" would validate the appointments here for at least a period long enough to sustain the Board decision at issue, if the Board prevailed on the other two questions presented. See Constitutional Law Scholars Amicus Br. 27 & n.9.

[5] As discussed in our opening brief (at 23-24), a 1901 opinion by Attorney General Knox concluded otherwise. 23 Op. Att'y Gen. 599. But his reasoning was expressly rejected by Daugherty. 33 Op.

2. *Intra-session recess appointments serve the purposes of the Clause*

Categorically excluding intra-session recesses—even when lengthy—from the scope of the Recess Appointments Clause would undermine its central purpose of ensuring that there will always be a mechanism to fill a vacancy and provide the President with the assistants he needs to execute the laws. Pet. Br. 19-20.

a. Because a recess commission is valid until the end of the Senate's "next Session," Art. II, § 2, Cl. 3, respondent contends (Br. 13) that intra-session recess appointments can be up to two years long, and that the ability to make such appointments would "render the advice-and-consent process a rarity for non-life-tenured positions." A two-year appointment, however, is possible only in unusual circumstances, when (1) the Senate takes a recess at the beginning of its session,[6] (2) the appointee is not confirmed and does not otherwise leave office, and (3) the Senate never adjourns its next session *sine die*. Assuming similar conditions, *inter*-session appointments

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Att'y Gen. at 21. Before Knox's opinion, the Solicitor of the Treasury had already opined that the President *could* make appointments during a holiday recess. See Letter to the Secretary of the Treasury from Maurice D. O'Connell, Dec. 21, 1901, Vol. 158, *Letters Sent, Jan. 1, 1821-Jan. 31, 1934* (Entry 67), Records of the Solicitor of the Treasury, 1791-1934, Record Group 206, National Archives College Park (NACP).

Respondent's quotations from other Attorney General opinions (Br. 16-19) are immaterial and taken from unrelated contexts.

[6] That unusual circumstance occurred here because the Twentieth Amendment independently started the session by providing that Congress's "meeting shall begin" on January 3. Amend. XX, § 2; see 75 Cong. Rec. 1373 (1932) (statement of Senator Norris, who proposed the Amendment: the "meeting referred to is the session").

could be almost as long.[7] Even taking the Senate's sessions as they actually occurred, inter-session recess appointments made in March 1849 or 1887 could have lasted more than 18 or 19 months, and those made in March 1793—and many other years—could have been at least 15 months.[8]

In any event, it is fanciful to suggest that allowing intra-session recess appointments would read the Appointments Clause out of the Constitution. Presidents have been making such appointments since the 1860s, and nobody believes the advice-and-consent process has ceased to be the principal means of appointing officers. Pet. Br. 20.

b. There is good reason for appointments to last until the end of the *next* session. When an intra-session recess falls shortly before the session's end, the Senate has little time to consider a nomination during that session. Permitting a temporary appointment to continue until the end of the next session ensures there is always one full session for the President and the Senate to engage in the nomination-and-confirmation process. See Pet. Br. 26 (discussing Senator Robert Taft's desire that a Secretary of Labor be recess appointed, to allow the nomination to be referred to committee). Congress took a similar approach with the first Militia Act of 1792, which was to remain in force for "two years, and from thence to the end of the next session of Congress thereafter." Act of May 2, 1792, ch. 29, § 10, 1 Stat. 265. The two-year peri-

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[7] An appointment made on March 4, 1823, would have lasted 643 days if the Senate never adjourned its next session *sine die*. See S. Pub. 112-12, *Official Congressional Directory, 112th Congress* 523 (2011) (*Congressional Directory*), www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf.

[8] *Congressional Directory* 522-527.

od ended during one session, *Congressional Directory* 522, but the law remained effective during the following recess (when President Washington employed it to quell the Whiskey Rebellion) and into the next session (when it was expressly repealed).[9] Thus, the period until "the end of the next session" was *longer* because it started during a session– just as it may be under the Recess Appointments Clause.

3. Intra-session recesses of significant length have generally precipitated recess appointments

a. Nearly every President whose term included a lengthy intra-session recess has made intra-session recess appointments. That includes dozens of appointments in the 1860s; several in the 1920s; and thousands since the 1940s. Pet. Br. 21-23, 25-27; Pet. Br. App. 1a-64a. Moreover, by 1921, Attorney General Daugherty had determined, by applying the considerations articulated in the Senate Judiciary Committee's 1905 report, that intra-session recesses of sufficient length do trigger the Recess Appointments Clause. *1905 Senate Report* 2; 33 Op. Att'y Gen. at 25; Pet. Br. 24-25.

There is accordingly no basis for respondent's assertions (Br. 24, 25) that historical practice "overwhelmingly refutes the Executive's position," or that the Executive believes that "the Constitution's meaning has changed." The change has not been in the Constitution's meaning, but in the underlying circumstances. For as long as there were no intra-session recesses of apprecia-

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[9] Proclamation (Aug. 7, 1794), in 33 *The Writings of George Washington* 459-460 (John C. Fitzpatrick ed., 1940); see also Letter from Henry Knox to Washington (Aug. 4, 1794), http://founders.archives.gov/documents/Washington/05-16-02-0354; Act of Feb. 28, 1795, ch. 36, § 10, 1 Stat. 425.

ble length, there were no intra-session recess appointments. But that changed in the 1860s, and especially after 1943, because lengthy intra-session recesses became more common.

b. There is no merit to respondent's belief that President Lincoln's 1862 and 1863 brigadier-general appointments were "unofficial[]" because the Army issued only "letters of appointment." Br. 25 (citations omitted). That was the "form then used for recess appointments to the Army." *O'Shea* v. *United States*, 28 Ct. Cl. 392, 401 (1893). Moreover, the recipients executed the oath of office that was required "to accompany the acceptance of every commissioned officer appointed or commissioned by the President."[10]

c. Respondent suggests (Br. 17-18 & n.12) that President Johnson may have thought his 1867 and 1868 appointments were made during inter-session recesses, viewing the multiple convenings of the Senate during those years as separate "sessions." But the Executive obviously believed otherwise. When one 1867 appointee was not confirmed, his appointment lasted well into 1868, because it was understood that the "next Session" was the next session following an adjournment *sine die*. *Gould* v. *United States*, 19 Ct. Cl. 593, 595-596 (1884).

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[10] *E.g.*, Letter from James H. Ledlie to L. Thomas, Dec. 27, 1862, *Letters Received by the Adjutant General's Office, 1861-1870* (National Archives Microform Publication M619, roll 114, file L675), Records of the Adjutant General's Office, 1762-1984, Record Group 94, National Archives Building, Washington, D.C. (NAB). Other records indicate the appointments expired "by constitutional limitation" at the conclusion of a Senate session when they were not confirmed. See, *e.g.*, Adjutant General Office Letter, Oct. 24, 1888, Claim of Widow of James H. Ledlie, Application 363,518, Certificate 253,231, 19th New York Infantry, Pension Records, Record Group 15, NAB.

Similarly, a number of 1868 appointees served until the next full session ended; when President Grant nominated their replacements, he said Johnson's appointments had expired on March 4, 1869. S. Exec. Journal, 41st Cong., 1st Sess. 15, 25, 30 (1869).[11]

d. While respondent does not dispute the extensive evidence of intra-session recess appointments since 1921, it contends (Br. 27) that Congress has "consistent[ly]" "resist[ed]" them. But respondent identifies no institutional action indicating that intra-session recess appointments are categorically unconstitutional. Indeed, the resolution Senator Byrd proposed in 1984 would have approved appointments during intra-session recesses "longer than 30 days." 130 Cong. Rec. 23,234; cf. Senate Rule XXXI(6) (providing that pending nominations lapse if they are not acted upon "during the session" or "if the Senate shall adjourn or take a recess for more than thirty days"); 150 Cong. Rec. 5373-5374 (2004) (Senator Cornyn defending constitutionality of intra-session recess appointment).

This Court should confirm that future Presidents may, like so many of their predecessors, make recess appointments during intra-session recesses of the Senate.

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[11] Some of respondent's amici contend that the nature of some of the Senate's 1867 and 1868 adjournments is unclear. During each of the recesses accounted for in our examples, the Senate intended to return, and did return, on a date certain, making them unlike adjournments *sine die*. *E.g.*, Cong. Globe, 40th Cong., 1st Sess. 458, 463 (1867); *id.*, 2d Sess. 4519 (1868). Even if the Court disregards appointments made during the April–July 1867 and July–September 1868 recesses, Johnson still made a substantial number of appointments during other, uncontested intra-session recesses. See Pet. Br. App. 4a-5a, 8a-9a.

B. The President May Fill Any Vacancy Existing During A Recess, Including One That First Arose Before That Recess

Since the Monroe administration, the Executive has repeatedly and openly construed the Recess Appointments Clause to authorize the President to fill vacancies that exist during a Senate recess, even if they did not first arise during that recess. Pet. Br. 29-38. Nearly every President in the last 190 years is known to have made appointments that would have been unconstitutional under respondent's contrary reading. Pet. Br. App. 68a-89a. Even before Monroe, the ambiguity of the Clause's text was acknowledged, and Presidents Washington, Jefferson, and Madison each made appointments that were inconsistent with respondent's reading. Pet. Br. 38-44.

1. Early debate and practice show that the Clause's text does not compel respondent's reading

a. Respondent contends (Br. 32-33) "[t]here is no serious question that [the Recess Appointments Clause] was originally understood" to apply only when a vacancy first arose "during the Recess." That is simply untrue. When President Washington's Attorney General adopted respondent's reading, he found it necessary to say the Clause should "be interpreted strictly," and his construction of "vacancy" differed from Alexander Hamilton's.[12]

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[12] Edmund Randolph's Opinion on Recess Appointments (July 7, 1792), in 24 *The Papers of Thomas Jefferson* 166 (John Catanzariti ed., 1990). Randolph believed an office was vacant upon its creation. *Ibid.* Hamilton believed it must be filled before it could become vacant. Letter from Hamilton to James McHenry (May 3, 1799), in 23 *The Papers of Alexander Hamilton* 94 (Harold C. Syrett ed., 1976).

President Adams disagreed with his own Secretary of War about it. Pet. Br. 40-41. And President Jefferson recognized that the text "is *certainly* susceptible of [two] constructions," because it may refer to "'vacancies that may happen to *be*' or [those that] 'may happen to *fall*'" during the recess.[13]

b. The question was settled for the Executive by Attorney General Wirt's 1823 opinion, which acknowledged the ambiguity but explained that the "happen to exist" reading was "the only construction of the constitution which is compatible with its spirit, reason, and purpose; while, at the same time, it offers no violence to its language." 1 Op. Att'y Gen. 631, 633-634.

Respondent asserts (Br. 35) that the Executive's reading fails to give effect to the phrase "that may happen." Yet, those words confine the President to filling vacancies that actually exist at the time of appointment. Pet. Br. 30-31. The Executive therefore gives meaning to all terms in the Clause, without requiring—as respondent would (Br. 36 n.26)—that the prepositional phrase "during the Recess" perform double duty by modifying "both" a noun phrase ("all Vacancies that may happen") and a verb phrase ("shall have Power to fill up").

Respondent's comparison (Br. 33-34) to the similar, but not identical, language in the Senate Vacancies Clause (Art. I, § 3, Cl. 2) does not eliminate ambiguity, because the Senate continued to debate that Clause for more than a century. In 1900, Senators relying on Wirt's recess-appointments opinion lost the election dispute

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[13] Letter from Jefferson to Wilson Cary Nicholas (Jan. 26, 1802), in 36 *The Papers of Thomas Jefferson* 433 (Barbara B. Oberg ed., 2009) (emphases added).

about Matthew Quay by only one vote in the Senate.[14] The majority did not argue that Wirt's by-then long-settled interpretation was wrong, but rather that "there is no analogy" between the two Clauses.[15]

c. Even before 1823, three of the first four Presidents made appointments inconsistent with respondent's view. Pet. Br. 39-40, 41-44. Respondent's quibbles with the historical record are unavailing.

Respondent repeats the unpersuasive theory that President Washington followed a "convoluted" process of making quick appointments during a session that could be declined during a recess, creating new vacancies. Compare Resp. Br. 37, with Teamsters Local 760 Resp. Br. 20-22 (recounting the "historical truth [that] refutes rather than supports that hypothesis").

Respondent also suggests (Br. 44) that Washington thought, counter-factually, that his appointees as Engraver of the Mint and District Attorney for Kentucky filled recently created vacancies because the general language at the top of the lists transmitting recess-appointed nominees to the Senate referred to the offices as "having fallen vacant during the recess of the Senate." Yet, the Engraver and District Attorney entries differ from every other item on those lists by failing to name the officer being replaced. See S. Exec. Journal, 3d Cong., 1st Sess. 142-143 (1793); *id.*, 4th Cong., 2d Sess. 216-217 (1796). And the actual commissions did not say the two positions *became* vacant during the recess, but

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[14] 33 Cong. Rec. 4612-4613 (1900); S. Rep. No. 153, 56th Cong., 1st Sess. 15-24 (1900); *id.* at 18 ("[W]e affirm with great confidence that the phrase used in the Constitution is employed * * * to describe a continuing condition without reference to the time or method of its origin.").

[15] *Id.* at 6.

merely that they were "at present vacant," which is consistent with our view.[16]

Respondent doubts (Br. 44) four appointments by President Jefferson, contending that the applicable statute "left then-existing officeholders in their offices until President Jefferson removed them." In fact, the cited section provided that Marshals and Attorneys would holdover only "for those districts * * * *within which they respectively reside.*" Act of Feb. 13, 1801, ch. 4, § 36, 2 Stat. 99 (emphasis added); see *id.* § 37, 2 Stat. 100. Potomac was carved out of the Maryland and Virginia districts, *id.* § 21, 2 Stat. 96, but Congress did not contemplate that two officials would thereafter *jointly* hold the same office in Potomac. Thus, after Jefferson removed the holdover Marshals for the new Eastern District of Virginia and reduced District of Maryland, he noted that their successors *in those districts* were recess-appointed "vice" the prior incumbents.[17] In Potomac, however, he considered the Marshal and District Attorney positions "unfilled" before his recess appointments.[18] And respondent's holdover theory cannot account for Jefferson's appointments in the District of Ohio (Pet. Br. App. 66a), which lacked incumbents because the

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[16] See Commission of Robert Scot, Nov. 23, 1793, Vol. 1, p. 30, *Temporary Presidential Commissions* (Entry 773), Records of the Department of State, 1763-2002, Record Group 59, NACP; Commission of William Clarke, Oct. 13, 1796, Vol. 1, p. 49, *id.*

[17] S. Exec. Journal, 7th Cong., 1st Sess. 403 (1802); List of Appointments and Removals (May 1802), in 33 *The Papers of Thomas Jefferson* 668 (Barbara B. Oberg ed., 2006).

[18] List of Appointments and Removals (after 10 May 1803), in 33 *Jefferson Papers* 671; Pet. Br. 41-42 & nn.38-39.

Northwest Territory had never had federal marshals or attorneys.[19]

Respondent ignores three appointments by President Madison (Pet. Br. App. 67a). In contesting two others, respondent simply errs (Br. 44) in speculating that Madison "likely waited" until after the Senate recessed before signing legislation passed on the last day of its session. See S. Journal, 13th Cong., 3d Sess. 689-690 (1815) (stating the "President of the United States this day approved and signed" the relevant act before noting the Senate adjourned *sine die*). Even so, the mere fact that a difference of a few hours would have required Madison to wait nine months before filling the Northern District of New York positions vividly demonstrates how contrary respondent's construction is to the Clause's purposes.

Thus, the first three decades of actual appointments by Presidents of the United States under the Constitution contradict respondent's assertion (Br. 36) that "the Executive Branch consistently agreed that the Clause was limited to those vacancies that arise during the recess."

2. The Executive Branch's interpretation has openly held sway since 1823

a. Respondent does not seriously contest that the Executive Branch's construction is of long standing. It identifies only one partially-contrary executive-branch opinion since 1823 (4 Op. Att'y Gen. 361 (1845)), but the same Attorney General effectively reversed himself the next year (4 Op. Att'y Gen. 523 (1846)). And there is no basis for respondent's suggestion (Br. 41 n.30) that President Lincoln's recess appointment of Justice David

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[19] See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50-53 (reaffirming the Northwest Ordinance).

Davis to fill a pre-existing vacancy on this Court was concealed from the Senate. Not only was the appointment publicized, the Clerk of the Court also published the order allotting the Court's Members (including Davis) among the circuits.[20]

b. Respondent relies "[f]oremost" (Br. 45) on many statutes enacted before 1866 providing that the President could fill certain offices during the Senate's recess. Those statutes do not bear upon the longstanding practice of presidential appointments directly under the Recess Appointments Clause, because the appointments on which we rely (Pet. Br. App. 65a-89a) were to offices not covered by such statutes. Respondent nonetheless infers that Congress would not have enacted such statutes if it believed the President had constitutional authority to fill vacancies arising before a recess. But some of the statutes addressed offices that would first exist *during a recess*, making them redundant even under respondent's view of the Constitution.[21] Moreover, almost all of the statutes were enacted in conjunction with Congress's creation of new offices, Resp. Br. App. 1a-17a, and may have been intended to address a question—inapplicable here—about whether an office could be "vacant" when it was never previously filled. See note 12, *supra*. And many of the statutes purported to impose a condition not contained in the Constitution (that the recess-appointee be nominated for advice-and-consent). Resp. Br. App. 8a-17a. Regardless, this Court has previously held that the President had constitutional powers even when that made statutory grants of power redun-

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[20] Daily National Intelligencer (D.C.), Oct. 30, 1862, p. 3, cols. A, C.

[21] See Act of Apr. 7, 1798, ch. 28, § 3, 1 Stat. 550; Act of Mar. 2, 1819, ch. 49, §§ 1, 9, 3 Stat. 493-494, 495; Act of July 30, 1852, ch. 75, § 4, 10 Stat. 26.

dant. See *Myers* v. *United States*, 272 U.S. 52, 145-146 (1926); *Ex parte Wells*, 59 U.S. (18 How.) 307, 315 (1856); *id.* at 322 (McLean, J., dissenting).

c. Respondent also points (Br. 40-41) to objections by various nineteenth-century Senators. Such objections, however, neither show that the constitutional text is unambiguous nor undermine the importance of 190 years of appointments by the President supported by numerous Attorney General opinions. See *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989).

Moreover, senatorial objections to the Executive Branch's interpretation largely subsided long ago. With the Pay Act in 1863, Congress explicitly contemplated recess appointments to vacancies that existed before the recess in which the appointments were made. See Pet. Br. 37. Respondent's assertion (Br. 46) that the Pay Act was predicated on the perceived unconstitutionality of such appointments is unavailing. By authorizing back pay for recess appointees who were later confirmed (see 9 Comp. Gen. 190, 190 (1929); 16 Op. Att'y Gen. 522, 531 (1880)), Congress gave Presidents an incentive to nominate appointees, but it could hardly have intended to pay for service it considered unconstitutional. Shortly thereafter, Congress *criminalized* the acceptance of other recess appointments it (wrongly) deemed unconstitutional. See Tenure of Office Act of 1867, ch. 154, § 5, 14 Stat. 431.

Even before the Pay Act, senatorial disapproval was not as uniform as respondent suggests. In responding to Senator Gore's failed attempt to censure President Madison for certain recess appointments in 1814, Senators Bibb and Horsey urged that the President was owed deference in his exercise of the recess-appointment power. See 26 Annals of Cong. 697 (1814); *id.* at 707-708.

3. Respondent's reading of "happen" would frustrate the Clause's purposes

Respondent nowhere explains why the Framers would have considered it necessary to permit the President to fill vacancies that arise during a particular recess, but not vacancies that remain unfilled (or are not yet known to exist) when the Senate recesses. Whether a vacancy first occurs before or during a particular recess, the demands of government may require it to be filled. Thus, the Executive's interpretation has long been acknowledged to accomplish the "whole purpose" of the Constitution. 1 Op. Att'y Gen. at 633; Pet. Br. 31-33. Respondent's position does not.

Respondent dismisses (Br. 47) this basic defect in its position by asserting that it would cause only "minor inconveniences" and suggesting that the President could invoke his power to convene the Senate "on extraordinary Occasions," U.S. Const. Art. II, § 3. But the Constitution's own architecture suggests otherwise. Vesting the President with *both* the power to recall the Senate *and* the power to make appointments during its recess indicates that the President need not declare an "extraordinary Occasion[]" to fill vacant offices. After Congress first authorized the rank of rear admiral in the Navy, one day before the Senate adjourned *sine die* in July 1862, President Lincoln recess-appointed four active-list rear admirals, including David G. Farragut.[22] In promoting the hero who had recently captured New Orleans, Lincoln should not have had to choose between recalling the Senate and waiting four months for its return.

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[22] Act of July 16, 1862, ch. 183, § 7, 12 Stat. 584; *News From Washington*, N.Y. Times, July 31, 1862, at 1.

C. The Senate Is In "Recess" Under The Recess Appointments Clause When Its Order Provides That, For 20 Days, It Will Hold Only Fleeting "Pro Forma" Sessions At Which "No Business" Is To Be Conducted

Respondent and its amici do not dispute that, if an intra-session recess triggers the President's Recess-Appointments-Clause authority, a 20-day recess suffices. Here, the Senate's December 17, 2011 order publicly assured its Members and informed the President that, over a 20-day period in January 2012, the Senate would hold only "pro forma" sessions (*i.e.*, sessions held merely for form) at which there would be "no business conducted." Pet. App. 91a. The President took the Senate at its word. And rightly so. No business was in fact conducted during the Senate's five pro-forma "sessions," each lasting between 28 and 30 seconds. Pet. Br. 48-49 & n.48. Nor, in the nearly two years since, has the Senate as a body taken any action indicating that the President mistook the situation by making recess appointments. The Court should reject respondent's contention that those avowedly "pro forma" sessions prevented the Senate's 20-day absence from being a "recess" for purposes of the Recess Appointments Clause.

1. The Senate declared itself unavailable to do business for 20 consecutive days

a. As explained in our opening brief (at 47-51), the period between January 3 and January 23, 2012, bore the hallmarks of a single 20-day recess, during which no work was done, no messages were laid before the Senate, and its Members were dispersed. Yet respondent contends (Br. 58-60) that the pro-forma sessions were business-as-usual for the Senate, because the Senate presumes a quorum (until a quorum call shows otherwise) and because the Senate conducts much of its busi-

ness by unanimous consent anyway. But the presumed presence of what the Constitution calls "a Quorum *to do Business*" (Art. I, § 5, Cl. 1 (emphasis added)) was irrelevant under an order that "no business" be conducted.

Respondent maintains (Br. 60) that the Senate was nonetheless "fully capable of doing business" during the pro-forma sessions, because "the presiding Senator could have sought unanimous consent, heard no objection, and proceeded to pass legislation, confirm nominees, or exercise any other Senate power." But respondent overlooks the Senate practices preventing a superseding unanimous-consent order from being adopted without confirmation that absent members did not object. See Pet. Br. 54 n.53 (describing clearance process preceding presentation of bill, resolution, or nomination on Senate floor). As respondent's Senator amici explain (Br. 20-21), although no formal rule prohibited a lone Senator from going rogue, there was still no actual risk that nominees would be considered at the pro-forma sessions, in light of "the Senate's traditions" and "the universal recognition that political Armageddon would ensue." See also 111 Cong. Rec. 26,465 (1965) (explaining that "a pro forma meeting is to meet and then adjourn as quickly as the Presiding Officer can put down the gavel, without any speeches and without any opportunity to be heard").

b. Respondent also relies (Br. 53-54) on the fact that, before the period in question, the Senate had twice passed legislation in sessions originally designated as pro forma. On those occasions, however, the decision to conduct business fundamentally transformed the session. What began as nothing but a matter of form ceased to be merely "pro forma" when the Senate unanimously

agreed to change course and act as a body, rather than simply adjourn.

Although the Senate *could* have similarly converted any of its January 2012 pro-forma sessions into one in which actual business was conducted, that theoretical possibility cannot be enough to deny the existence of a recess, because the same possibility is present whenever the Senate is in recess—even an inter-session recess—under a conditional adjournment resolution. Such resolutions often provide that congressional leadership may require the resumption of business during the recess if the public interest warrants. Pet. Br. 52-53. Respondent and its amici do not dispute that the unanimous-consent nature of the "no business" order here established an even higher hurdle to overcome than does a typical resolution to adjourn *sine die* (which everyone concedes would create a recess under the Recess Appointments Clause). *Id.* at 54.

The President accordingly had every reason to conclude, on the basis of the "no business" order, that the Senate was unavailable as a body to "receive communications from the President or participate as a body in making appointments," *1905 Senate Report* 2—classic indications that it was in recess. Cf. *The Pocket Veto Case*, 279 U.S. 655, 683 (1929) (under Art. I, § 7, Cl. 2, a vetoed bill may be returned to the originating House only when it is "sitting in an organized capacity for the transaction of business, and having authority to receive the return, enter the President's objections on its journal, and proceed to reconsider the bill," and "no return can be made to the House when it is not in session as a collective body and its members are dispersed").[23]

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[23] Respondent's amici Senators suggest (Br. 25) that it sufficed for the Secretary of the Senate to receive presidential messages. But

2. *There is no historical pedigree for using a long series of pro-forma sessions to avoid a recess*

Respondent contends (Br. 50-58) there is a long pedigree for Senate use of pro-forma sessions "for various purposes." But the vast majority of the isolated sessions respondent identifies are markedly different from the string at issue here. The historical roots of the practice in question here extend no farther than 2007, which marked the first time a daisy-chain of pro-forma sessions was purported to prevent a recess.

Before 2007, according to respondent's list (Br. App. 18a-30a), nearly every previous purportedly pro-forma session was an isolated event. Indeed, respondent identifies only a handful of back-to-back pro-forma sessions and only two occasions before 2007 on which there were as many as three consecutive pro-forma sessions (from January 8 to 15, 1981; and from October 21 to November 8, 2002). Because so few of the resulting periods between business sessions were at least ten days long (*i.e.*, the length of the *shortest* intra-session recess in which any President has made a recess appointment[24]), it is unsurprising that no previous President "attempted to make recess appointments during [pro-forma] sessions" (Resp. Br. 54).

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that routinely happens during recesses, and the fact that messages received on January 12 and 18 were not formally laid before the Senate until it resumed business on January 23 (see 158 Cong. Rec. S37 (daily ed. 2012)) indicates that it was unavailable to act in the interim. Cf. *The Pocket Veto Case*, 279 U.S. at 683-684 (holding delivery of bill to Senate "officer or agent" when it was not in session was constitutionally inadequate).

[24] See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __, at 7 n.9 (Jan. 6, 2012), www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

Even aside from the question of length, many of the previous sessions that respondent identifies materially differ from the January 2012 period. For instance, the earliest resolutions were not binding unanimous-consent orders to do no business for a period. They were instead informal agreements that assumed, without ordering in any binding way, that no business would be done. See, *e.g.*, Cong. Globe, 33d Cong., 1st Sess. 1347 (1854) (Senator Stuart: "Gentlemen may come here disposed to do business, and I will come here too. I will come with the expectation that we shall be obliged to adjourn without a quorum."); 22 Cong. Rec. 841 (1890) (Senator Hoar: "I understand [that] * * * there is an understanding—an informal understanding, but I suppose it will be respected by every Senator—that at that time the Vice President shall adjourn the Senate until Monday at 12 o'clock.").[25] Furthermore, during several sessions cited by respondent, the Senate did not wholly cease business, instead continuing more functions than the no-business order at issue here allowed. See, *e.g.*, 30 Cong. Rec. 842 (1897) (receiving messages from the President and the House before adjourning); 98 Cong. Rec. 3955 (1952) (authorizing Presiding Officer to sign enrolled bills); 126

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[25] In 1876, multiple Senators objected to a formal, binding resolution to meet in a series of sessions without doing any business, concluding that such a resolution would violate the Adjournment Clause. Pet. Br. 60-61; see 5 Cong. Rec. 334 (1876) (Senator Anthony: "I propose that we shall do it informally because it does not seem to us to be in our constitutional power to make such a form of adjournment formally."). Contrary to respondent's suggestion (Br. 57-59) that a resolution like the unanimous-consent order here would have satisfied those Senators, their constitutional concerns were ultimately assuaged only by a resolution with no such binding requirement. Pet. Br. 61.

Cong. Rec. 2574 (1980) (allowing committees to file bills during an otherwise pro-forma session).

3. The Rules of Proceedings Clause does not permit the Senate to alter the balance between the Appointments and Recess Appointments Clauses

Respondent's appeal to the Senate's historical use of pro-forma sessions suffers from another flaw: It assumes that, if the Senate may resort to a fictitious "session" to meet constitutional requirements dealing with internal legislative procedures, then it is equally free to use the same legislative fiction to manipulate the President's authority under the Recess Appointments Clause. That is a non sequitur. Whatever leeway the Senate may enjoy when governing its own affairs, it cannot exploit that leeway to limit the President's constitutional authority or visit adverse consequences on the people protected by the duly-enacted laws the officers would be appointed temporarily to administer. Pet. Br. 61-64. The Court emphasized in *INS* v. *Chadha*, 462 U.S. 919 (1983), that the Rules of Proceedings Clause (Art. I, § 5, Cl. 2) provides each House with authority to establish rules governing its *internal* processes but "only empowers Congress to bind itself." 462 U.S. at 956 n.21. The Senate cannot, through that circumscribed authority, unilaterally control the interpretation of the Recess Appointments Clause. See *United States* v. *Ballin*, 144 U.S. 1, 5 (1892) (explaining that the Rules of Proceedings Clause "may not" be invoked to "ignore constitutional restraints"); *United States* v. *Munoz-Flores*, 495 U.S. 385, 392 n.4 (1990) ("Where, as here, a constitutional provision is implicated, [*Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892),] does not apply.").

Respondent's invocation of the Rules of Proceeding Clause is also flawed on a more basic level. The question

before the Court in *Ballin*—whether the House of Representatives possessed a quorum when it passed certain legislation—was conclusively answered by a formal quorum call entered into the House Journal. 144 U.S. at 2-3. In that context, the Clause allows each House to prescribe how to establish that it "is in a condition to transact business." *Id.* at 6. In contrast, the Senate here did not issue a formal rule or resolution stating it regarded itself as not being in recess under the Recess Appointments Clause. To the contrary, the orders adopted by the Senate on December 17, 2011, support the conclusion that it was in recess.[26] Moreover, a hypothetical Senate view of its orders' effect (a view the Senate has not offered in this litigation) could not control the interpretation of the Recess Appointments Clause.[27] Otherwise, no principle would limit the Senate's ability to disrupt the balance regarding appointment of federal officers—a balance heretofore achieved through centuries of Senate–Executive interactions.

The Senate's choice remains the same it has faced since the earliest days of the Republic: remain in session for the conduct of business or depart for an extended

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[26] See 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (asking and obtaining "unanimous consent that *notwithstanding the Senate's recess*, committees be authorized to report legislative and executive matters on Friday, January 13, 2012, from 10 a.m. to 12 noon") (emphasis added); *ibid.* (authorizing Senate leadership's appointment authority "notwithstanding the upcoming recess or adjournment of the Senate").

[27] The amicus brief filed by 45 individual Senators is, of course, not a statement of the *Senate's* position. See *Raines* v. *Byrd*, 521 U.S. 811, 829 (1997) (distinguishing between individual views of Members of Congress and those "authorized to represent their respective Houses"); 2 U.S.C. 288b(c) (requiring Senate resolution for Senate Legal Counsel to appear as amicus curiae on Senate's behalf).

period with the knowledge that the President may temporarily fill vacant offices in order to carry out his responsibilities under the Take Care Clause. Because the Senate cannot simultaneously do both, this Court should sustain the validity of his appointments to the Board.

* * * * *

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

DECEMBER 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-1281

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FILED
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In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
NOEL CANNING, A DIVISION OF THE NOEL CORP., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF ALABAMA, ARIZONA, COLORADO, FLORIDA, GEORGIA, IDAHO, KANSAS, MICHIGAN, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, VIRGINIA AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING RESPONDENT NOEL CANNING

LUTHER STRANGE
Alabama Attorney General

John C. Neiman, Jr.*
Alabama Solicitor General
Andrew L. Brasher
Dep. Ala. Solicitor General
Megan A. Kirkpatrick
Ass't Ala. Solicitor General
OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 353-2187
jneiman@ago.state.al.us

*Counsel of Record

November 25, 2013

(counsel for additional *Amici* listed at end of brief)

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QUESTIONS PRESENTED

On the day after the Senate convened in a pro-forma session to commence the Second Session of the 112th Congress, and two days before the Senate convened in another pro-forma session, the President purported to make three "recess" appointments to fill preexisting vacancies on the National Labor Relations Board. The questions presented are therefore:

1. Whether the President's recess-appointment power may be exercised during a break that occurs during the Senate's Session, or is instead limited to "the Recess" that occurs between each enumerated Session.

2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arise during that recess.

3. Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro-forma sessions.

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INTEREST OF *AMICI CURIAE*

This is not simply a case about the separation of powers and checks and balances within the national government. It is also a case about federalism—and, ultimately, the individual freedoms States want their citizens to enjoy.

In our constitutional system, the concepts of separation of powers and checks and balances are inextricably intertwined with principles of state sovereignty and individual liberty. The Constitution, in structuring the three branches of the federal government as it does, was intentionally designed to protect "State sovereign interests." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985). To this end, the Senate is especially important. By giving States equal representation in that chamber, the Framers intended for it to be the "instrument for preserving" States' "residuary sovereignty." THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed. 1961). And the Constitution's recognition of state sovereignty through the Senate is not just an end in and of itself. It is also a means of securing "'the liberties that derive'" to individual citizens "'from the diffusion of sovereign power.'" *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

At issue here is the President's attempt to circumvent the system of checks and balances, against a backdrop that vividly underscores the Senate's role in preserving the federal balance and individual liberty. The NLRB has always had unusual capacity to trammel state prerogatives, and, in recent years, the agency has upset the federal balance in unprece-

dented ways. In particular, the agency has aggressively attacked States' attempts to grant their citizens more freedom in the labor sphere. But the Constitution provides the States an important check. In light of the advice-and-consent requirement, the States' representatives in the Senate may respond to the NLRB's improper assertions of federal authority by refusing to consent to the appointment of Board nominees without first ensuring that they respect the federal balance. That is what Senators vowed to do in the circumstances presented here. But rather than try to develop consensus around a set of nominees, the President defied his coordinate branch's exercise of its constitutional prerogative. He appointed Board members without trying to seek the Senate's approval. He purported to do so under his recess-appointment power—even though the Senate had expressly declined to go into recess at that time, and even though it had expressly done so because it wanted to review any NLRB nominees the President put forward.

The President's approach, if it is allowed to stand, would not just undermine the relations between the Executive and Legislative branches. It also would substantially undermine the protections advice-and-consent provides for federalism and individual liberties. The States have vital interests in seeing that these safeguards remain in place.

SUMMARY OF ARGUMENT

This case's factual backdrop underscores the important role advice-and-consent plays in safeguarding federalism. The Senate's concerns over the nominees at issue here arose, in substantial part, from NLRB actions that had undermined state interests.

The Senate must be able to use the advice-and-consent process to protect state prerogatives and individual liberty in these circumstances, and the President must not be able to circumvent the process through recess appointments.

A. During the timeframe at issue, the NLRB took unprecedented and unauthorized action that interfered with state law. Most notable was a complaint the NLRB filed to stop the Boeing Company from building a new plant in South Carolina, a State that grants its citizens the right to work without joining a union. States with similar laws feared that the complaint was designed to undermine their citizens' liberty, and they were concerned that similar enforcement actions by the President's appointees would negatively affect growth within their borders.

B. States' representatives in the Senate responded by exercising their advice-and-consent function. They withheld consent for the President's pending NLRB nominations, used pro-forma sessions to avert recess appointments, and urged the President to subject future nominees to the usual confirmation process. Instead of compromising, the President made two new nominations at the very end of the Session, such that confirmation before the next Session was not practicable. He then attempted to use recess appointments on these nominees after the next Session began, even though the Senate held pro-forma sessions to avoid having a recess.

C. Federalism principles underscore the incompatibility between the President's actions and the constitutional design. The Constitution gave advice-and-consent power to the Senate, the chamber that represents state interests equally, because the

Framers wanted to prevent the Executive from abusing the appointment power. Yet under the President's view, even when the States' representatives in the Senate decline to confirm a particular nominee because of substantial concerns about federalism and individual liberty, the President can, during any time he unilaterally determines the Senate to go into "recess," appoint that same nominee to a term that lasts as long as two years. That cannot be the law. At the very least, when the Senate informs the President that it is not in recess, proper respect for both the separation of powers and federalism requires the President to seek the Senate's consent for the appointments he wishes to make for important federal offices.

ARGUMENT

It is telling that the words "right to work" and "Boeing" do not appear in any of the top-side briefs. These words provide critical context in this case. They demonstrate that the system of checks and balances is not an abstract legal concept that affects only a select number of federal officials in Washington, D.C. They show that this Court's resolution of the questions presented will have a significant impact on the States and citizens throughout the country. And they demonstrate that the President's invocation of the Recess Appointments Clause to put these nominees on the NLRB, if allowed to stand, will substantially undermine one of the Constitution's safeguards of federalism and the democratic liberty it secures.

Numerous judicially enforceable rules directly promote federalism by limiting the federal government's powers with respect to the States. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 610 (2000);

Printz v. United States, 521 U.S. 898, 922-23 (1997). Other judicially enforceable rules, concerning the separation of powers and checks and balances, safeguard federalism in a less direct but no less important way. These rules impose a structure on the national government that is expressly designed to "protect the States from" federal "overreaching." *Garcia*, 469 U.S. at 550-51 (citing, among other sources, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)). Chief among these safeguards is the "equal representation" States receive in the Senate. *Id.* at 551 (citing THE FEDERALIST NO. 62, at 408 (James Madison) (B. Wright ed., 1961)). Also crucial is the right of the States' representatives in the Senate to offer their advice and consent on the President's nominees to important federal positions. *See Myers v. United States*, 272 U.S. 52, 119-20 (1926); THE FEDERALIST NO. 76, at 456-58 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

It is critical, from a federalism perspective, for the courts to enforce these rules, and the Court should do so here. The President violated the advice-and-consent requirement when he made the appointments at issue in this case, and he did so against a factual backdrop that made the federalism costs all too clear. As explained below, the Senate's concerns over the President's nominees arose, in no small part, from the NLRB's actions against state policies designed to create more individual freedom in the labor sphere. These actions included, most notably, the NLRB's attempt to sanction the Boeing Company for locating a plant in a State that grants its citizens

a right to work without joining unions. To preserve federalism and the liberties it secures, the Senate must be able to use the advice-and-consent process to protect state prerogatives in circumstances like these. The recess-appointment power does not allow the President to circumvent the safeguards of federalism in this way.

A. Federal agencies like the NLRB, if left unchecked, can upset the federal balance.

The appointments at issue involved an agency that, due to its history and statutory framework, has a unique capacity to intrude on state interests. These intrusions were particularly pronounced and controversial at the times that were critical to this case.

1. The NLRB regulates in an area of paramount state concern.

The NLRB's very creation affected the federal balance. When this Court first recognized the agency's power to regulate labor in the manufacturing industry, in *NLRB v. Jones & Laughlin Steel Corp.*, it did so by only a one-vote margin. *See* 301 U.S. 1 (1937). The four dissenting justices argued that the Court had fundamentally altered constitutional law and allowed Congress to enter a field that previously had been "reserved to the states." *Id.* at 97 (McReynolds, J., dissenting). In more recent times, this Court described *Jones & Laughlin* as a "watershed case" that "greatly expanded the previously defined authority of Congress." *Lopez*, 514 U.S. at 555-56; *see also id.* at 573 (Kennedy, J., concurring) (noting that *Jones & Laughlin* marked the Court's "definitive commitment" to a new conception of the Commerce power); *id.* at 599 (Thomas, J., concurring) (calling

the decisions of the *Jones & Laughlin* era a "dramatic departure . . . from a century and a half of precedent").

The *Jones & Laughlin* Court's understanding of the Commerce Clause is now accepted law, but the NLRB's intrusion on state interests remains extraordinary. The agency's authorizing statute, the National Labor Relations Act, "prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Wisc. Dep't. of Indus., Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986). In breach-of-contract cases concerning collective bargaining agreements, "the application of state law . . . is pre-empted." *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 405-06 (1988). And with certain exceptions, Congress "completely displaced state power" over labor-relations disputes, giving jurisdiction instead to the NLRB. *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 3 (1957).

2. The NLRB's actions in 2011 marked substantial incursions against state interests.

Despite the federal government's substantial preemption of this field, Congress also has recognized that States retain vital interests in preserving citizens' liberties in the labor sphere and promoting economic growth through labor policy. Most critically for present purposes, the Taft-Hartley Act of 1947 authorizes States to adopt "right to work" laws if they so choose. *See* 29 U.S.C. §164(b). These laws prohibit closed-shop agreements that force all em-

ployees at a particular workplace to join a union. *See generally* Jeanne Mirer, *Right-to-Work Laws: History and Fightback*, 70 NAT'L LAW. GUILD REV. 30, 31-32 (2013).

Twenty-four States currently have right-to-work laws, and their proponents argue that they are crucial to preserving employees' economic liberties. *See generally* Raymond Hogler & Steven Shulman, *The Law, Economics, and Politics of Right to Work: Colorado's Labor Peace Act and Its Implications for Public Policy*, 70 U. COLO. L. REV. 871, 892 (1999). As Justice Frankfurter has noted, even Justice Brandeis, while once "a staunch promoter of unionism," had argued that unions would benefit if the "'privilege of individualism'" among employees was "'protected by law.'" *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 550, 552 (1949) (Frankfurter, J., concurring) (quoting Louis D. Brandeis, *Peace with Liberty and Justice*, 2 NAT. CIVIC FED'N REV., 1, 16 (1905)). This was so, Justice Brandeis said, because "'the American people'" would "'not consent to the exchange of the tyranny of the employer for the tyranny of'" unions. *Id.* at 551 (quoting Letter from Louis D. Brandeis to Lincoln Steffens (Feb. 26, 1912)). Many advocates of right-to-work laws also claim that these laws promote economic development and growth. *See generally* Hogler & Shulman, *supra*, at 893.

That said, some labor advocates have criticized these laws as undermining unions' collective bargaining power. *See id.* at 926. When the President first sought to fill the NLRB vacancies at issue in this case, right-to-work States were concerned that the President's appointees had sided with those ad-

vocates and were actively working to undermine these laws. These concerns were a critical factor in the conflict that eventually arose between the President and Senate over these nominations.

a. The NLRB took unprecedented action against right-to-work States.

Of particular concern was the NLRB's response, in 2011, to the Boeing Company's announcement that it planned to build a factory in a right-to-work State. Boeing manufactures its Dreamliner 787 jet in Everett, Washington. It had negotiated with its union there to place a second assembly line in Everett, but those talks broke down in 2009. Boeing then decided to put the second line in South Carolina, a right-to-work State. South Carolina reportedly had developed a $900 million incentive package to lure the company. *See* David Slade & Katy Stech, *Boeing's Whopping Incentives*, THE POST AND COURIER (Jan. 17, 2010).[1] In public statements, Boeing officials also explained that South Carolina was attractive because of its favorable legal climate. One executive reportedly stated that he expected the new plant to have fewer work stoppages due to union strikes. *See* Complaint & Notice of Hearing at 4, *The Boeing Company and International Association of Machinists*, No. 19-32431, NLRB Region 19 (Apr. 20, 2011) (hereinafter "Boeing Complaint").[2]

The NLRB then took action that, according to one former NLRB Chairman, was unprecedented. *See*

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[1] Available at http://www.postandcourier.com/news/2010/jan/17/boeings-whopping-incentives/ (last visited Nov. 19, 2013).

[2] Available at http://www.nlrb.gov/news-outreach/fact-sheets/boeing-documents (last visited Nov. 19, 2013).

Philip Klein, *Former NLRB Chairman Says Board's Complaint Against Boeing is Unprecedented*, S.F. EXAMINER (Apr. 21, 2011) (quoting Peter Schaumber).[3] It filed a complaint alleging that Boeing, by basing its decision to relocate on South Carolina's favorable legal environment, had "'interfere[d] with, restrain[ed], or coerce[d] employees'" at its Washington plant "in the exercise of the rights guaranteed" by the NLRA. Boeing Complaint, *supra*, at 7 (quoting 29 U.S.C. §158(a)(1)). The NLRB also alleged that Boeing's plan discouraged union membership "by discrimination in regard to hire or tenure of employment or any term or condition of employment." 29 U.S.C. §158(a)(3). The NLRB sought the drastic remedy of compelling Boeing to build the second assembly line in Washington. *See* Boeing Complaint, *supra*, at 7-8.

The NLRB's complaint was meritless on its face. Boeing was expanding into South Carolina—not withdrawing from Washington. The company thus did not come close to violating NLRA provisions that make it illegal for employers to discriminate against their employees because of union activity. *See generally NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (statements about the employer's beliefs of the effects of unionization are lawful, so long as the employer does not make threats or promises). Even if Boeing had proposed to relocate its entire operation to South Carolina, it is well established that employers can close or relocate a union shop for economic reasons. *See First Nat'l Maint. Corp. v. NLRB*, 452

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[3] Available at http://www.sfexaminer.com/sanfrancisco/former-nlrb-chairman-says-boards-complaint-against-boeing-is-unprecedented/Content?oid=2173580 (last visited Nov. 19, 2013).

U.S. 666, 677, 686 (1981). As this Court has explained, "Congress had no expectation that the elected union representative would become an equal partner" in decisions of this sort. *Id.* at 676.

The NLRB's actions provoked a dramatic backlash from States and their representatives in Congress. South Carolina's Attorney General, joined by Attorneys General from eight other States, told the NLRB that its complaint would "undermine[] our citizens' right to work as well as their ability to compete globally." Letter from Alan Wilson, South Carolina Attorney General, to Lafe E. Solomon, Acting General Counsel, NLRB (Apr. 28, 2011).[4] The Senate convened a hearing at which Boeing's General Counsel, former Fourth Circuit Judge J. Michael Luttig, testified that the NLRB's requested relief would "effectively prevent employers with unionized workforces from expanding into Right-to-Work States." *The Endangered Middle Class: Is the American Dream Slipping Out of Reach for American Families?: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 112th Cong. 24 (2011). Senators proposed bills to protect right-to-work laws and to prevent the NLRB from discouraging businesses from moving to right-to-work States. Job Protection Act, S. 964, 112th Cong. (2011); Jobs Through Growth Act, S. 1720, 112th Cong. §§3951-53 (2011); 157 CONG. REC. S2590-93 (daily ed. May 3, 2011) (statements of Sens. Alexander, DeMint, and Graham).

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[4] Available at http://www.scag.gov/wp-content/uploads/2011/05/4.28.11_NLRB_Letter_Formatted_with_Signatures.pdf (last visited Nov. 19, 2013).

Ultimately, in late 2011, the NLRB withdrew its complaint. But it did so only after the union at the Washington plant had negotiated a new, favorable labor agreement with Boeing—and only after the union had asked the NLRB to stand down. *See* Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. TIMES (Dec. 9, 2011).[5] In the wake of that development, a Senator from South Carolina expressed concern that "the NLRB complaint was used as a negotiating tool against Boeing" and that the NLRB had abandoned its role as "neutral arbiter" between labor and management. *See* Press Release, Sen. Lindsey Graham, Graham Calls for Investigation into NLRB-Union Collaboration (Dec. 9, 2011).[6]

b. The NLRB took inappropriate action against state laws protecting the right to vote by secret ballot.

Although the South Carolina right-to-work incident generated the most vocal criticism of the agency, the NLRB took other action against employee freedom that was just as disconcerting to States. In late 2010, voters in Arizona, South Carolina, South Dakota, and Utah adopted amendments that protect employees' right to vote in union elections via secret ballot. *See* ARIZ. CONST. art. 2, §37; S.C. CONST. art. 2, §12; S.D. CONST., art. 6, §28; UTAH. CONST. art. 4,

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[5] Available at http://www.nytimes.com/2011/12/10/business/labor-board-drops-case-against-boeing.html (last visited Nov. 18, 2013).

[6] Available at http://www.lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=24553900-802a-23ad-4cfe-05130335b0a0 (last visited Nov. 19, 2013).

§8. Like laws providing for secret ballots in normal elections, these amendments are designed to make union-representation elections less coercive. This Court has observed that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 602 (1969). Yet the NLRB wrote letters to all four of these States in January 2011, claiming that federal law preempted these amendments. *See* Letters from Eric Moskowitz, Assistant General Counsel, NLRB, to Tom Horne, Arizona Attorney General; Alan Wilson, South Carolina Attorney General; Marty Jackley, South Dakota Attorney General; and Marc Shurtleff, Utah Attorney General (Jan. 13, 2011).[7]

The NLRB's actions once again prompted controversy. Citing the agency's threats, one Senator introduced a bill "intended to 'guarantee the right of every American worker to have a secret ballot election on whether to unionize.'" Seth Borden, *Senator DeMint Introduces Secret Ballot Protection Act in Senate*, LABOR RELATIONS TODAY (Jan. 27, 2011) (discussing Secret Ballot Protection Act, S. 217, 112th Cong. (2011)). Meanwhile, the affected States informed the NLRB that its arguments were baseless. *See* Letter from Alan Wilson, South Carolina Attorney General *et al.* to Lafe E. Solomon, Acting General Counsel,

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[7] Available at http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3298/letter_az.pdf; http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3298/letter_sc.pdf; http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3298/letter_sd.pdf; and http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3298/letter_ut.pdf (last visited Nov. 19, 2013).

NLRB (Jan. 27, 2011).[8] The States' Attorneys General told the agency it was misinterpreting their amendments as requiring "elections when federal law does not." *Id.* They pointed out that "[s]ecret elections promote freedom of association, here the freedom to decide for oneself, without interference, whether to join a union." *Id.* at 2. They reminded the NLRB that it previously had conceded that "both the Board and courts have long recognized that the freedom of choice guaranteed employees by [the NLRA] is better realized by a secret election than a card check." *Id.* at 1 (quoting *In re Dana Corp.*, 351 NLRB 434, 438 (2007)). And they called it "extraordinary" for the NLRB to "use its resources to sue our States for constitutionally guaranteeing the right to vote by a secret ballot." *Id.*

The NLRB nevertheless chose to pursue its challenge. When the NLRB sued Arizona in a test case, the district court granted summary judgment in Arizona's favor. *See NLRB v. Arizona*, No. CV 11-913, 2012 WL 3848400 (D. Ariz. Sept. 5, 2012).

B. The Senate safeguards state interests in these matters through advice-and-consent.

The Senate's lack of consent to the President's nominations in 2011 resulted in part from concerns about the NLRB's record on right-to-work and ballot-secrecy laws. The President's resort to the recess-appointments power, in turn, resulted from his failure to meaningfully address those concerns with his coordinate branch during the 2011 session.

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[8] Available at http://amlawdaily.typepad.com/states%20respond.pdf (last visited Nov. 20, 2013).

1. Senators withheld consent for pending NLRB nominations and insisted on advice-and-consent for future ones.

When the NLRB took these actions, the President had not yet nominated either Sharon Block or Richard Griffin, whose appointments are at issue here, to the Board.[9] But two other crucial nominations were pending—Lafe Solomon as NLRB General Counsel, and Craig Becker as a Member of the Board. The NLRB's stance on right-to-work laws and ballot-secrecy issues became an issue for both nominations because both nominees already were serving the NLRB at the time. Solomon was Acting General Counsel, and Becker was a purported recess appointee to the Board.

Becker's nomination was controversial from the start. The President had nominated him to a full term the year before. *See* 156 CONG. REC. S59 (daily ed. Jan. 20, 2010). The Senate had not confirmed him, and his detractors cited, among other things, concerns that he was hostile to secret-ballot elec-

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[9] The President had nominated Terence Flynn, the third recess appointment at issue, in January 2011. 157 CONG. REC. S69 (daily ed. Jan. 5, 2011). Traditionally, the Board is composed of three members from the same political party as the president and two members from the minority party. *See* Melanie Trottman, "NLRB Nominees Are Confirmed," WALL STREET JOURNAL (Jul. 30, 2013), available at http://online.wsj.com/news/articles/SB10001424127887323854904578637872875060486 (last visited Nov. 18, 2013). Flynn was a nominee from the minority party. The Senate apparently did not "push[] for a vote on Flynn's nomination" in 2011. Laura Meckler & Melanie Trottman, *Obama's NLRB Appointments: Why the Rush?* WALL STREET JOURNAL WASHINGTON WIRE (Jan. 6, 2012), available at http://blogs.wsj.com/washwire/2012/01/06/obamas-nlrb-appointments-why-the-rush/ (last visited Nov. 19, 2013).

tions. *See, e.g.*, Carl Hulse, *Republicans Block Confirmation of Labor Lawyer*, THE CAUCUS (Feb. 9, 2010);[10] *Full Committee Hearing—Nomination of Harold Craig Becker to be a Member of the National Relations Board: S. Comm. On Health, Education, Labor, & Pensions*, 111th Cong. (2010) (statements of Sens. Isakson and Hatch). Once it was clear Becker would not make it through the Senate, the President purported to give him a 20-month recess appointment in March 2010. *See* Press Release, The White House, "President Obama Announces Recess Appointments to Key Administration Positions" (Mar. 27, 2010).[11] That move prompted outcry from the Senate. One member argued that the President had "ignored the Senate's bipartisan rejection" of Becker and should have opted for a "consensus nominee" instead. Orrin Hatch, Press Release, Hatch Blasts Obama Administration Recess Appointment of Craig Becker to NLRB (Mar. 27, 2010).[12]

Things got worse with the advent of the Boeing complaint, filed under Solomon's name in April 2011. It prompted a group of 19 Senators to call on the President to withdraw both the Solomon and Becker

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[10] Available at http://thecaucus.blogs.nytimes.com/2010/02/09/senates-vote-on-labor-nominee/ (last visited Nov. 19, 2013).

[11] Available at http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions (last visited Nov. 19, 2013).

[12] Available at http://votesmart.org/public-statement/495479/hatch-blasts-obama-administration-recess-appointment-of-craig-becker-to-nlrb#.Uo1AXdJwrPw (last visited Nov. 19, 2013). The Third Circuit eventually would hold that Becker's recess appointment was invalid on reasoning similar to the D.C. Circuit's. *See NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 244 (CA3 2013).

nominations. *See* Letter from Senator Jim DeMint to President Barack Obama (May 4, 2011).[13] These Senators informed the President that they believed that "recent actions by your handpicked political appointees at the National Labor Relations Board are making it more difficult for America to win the future." *Id.* at 1. They contended that "[t]he NLRB, at the behest of Acting General Counsel Lafe Solomon, has taken unprecedented action against The Boeing Company to prevent it from expanding productions into South Carolina, a state that assures workers the freedom not to join a union as a condition of employment." *Id.* They stated that they "consider[ed] this an attack on millions of workers in 22 right-to-work States, as well as a government-led act of intimidation against American companies that should have the freedom to choose to build plants in right-to-work states." *Id.* They claimed that their chamber "ha[d] been unacceptably denied the ability to exercise its constitutional duty of advise and consent" on Becker. *Id.* at 2. These Senators pledged to "vigorously oppose both nominations, vote against cloture and use all procedural tools available to defeat their confirmation." *Id.*

Legislators simultaneously called for the use of pro-forma sessions to prevent another recess appointment to the Board. Twenty Senators wrote the Speaker of the House in May 2011, arguing that the President's recess appointees were "using their positions to implement policies that destroy jobs, and infringe upon the freedom on the American people."

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[13] Available at http://www.foxnews.com/projects/pdf/2011_05_04_Letter_to_President_Obama_on_NLRB1.pdf (last visited Nov. 19, 2013).

Letter from Senator David Vitter to Speaker John Boehner (May 25, 2011) (hereinafter "May 25 Letter").[14] They noted that "Article I, Section 5 of the United States Constitution states, 'Neither House, during the Session of Congress, shall, without the consent of the other, adjourn for more than three days[.]'" *Id.* They asked the Speaker "to refuse to pass any resolution to allow the Senate to recess or adjourn for more than three days for the remainder of the president's term." During the same timeframe, 80 members of the House of Representatives, citing concerns about the Boeing case, asked House majority leadership to take the same measures. *See* Letter from Representative Jeff Landry to Speaker John Boehner (Jun. 15, 2011).[15]

As the First Session of the 112th Congress wound down, the President had not withdrawn either nomination, and the Senate's concern about the NRLB's approach to these issues continued to loom large. When the NLRB withdrew the Boeing complaint, Senator Graham from South Carolina called for a "congressional investigation to answer questions about the NLRB's role, attitude, and relationship with the parties" in the Boeing matter. Press Release, Senator Lindsey Graham, Graham Calls for Investigation into NLRB-Union Collaboration (Dec.

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[14] Available at http://www.vitter.senate.gov/newsroom/press/vitter-demint-urge-house-to-block-controversial-recess-appointments (last visited Nov. 19, 2013).

[15] Available at http://woodall.house.gov/sites/woodall.house.gov/files/Freshmen%20Recess%20Appointment%20Letter.pdf (last visited Nov. 19, 2013).

9, 2011).[16] He also announced that he would "continue to block all nominations to the NLRB until we get satisfactory answers regarding their role in this entire saga." *Id.*

2. The President gave the Senate no meaningful opportunity to advise and consent on the nominations at issue here.

The President did not withdraw Solomon's nomination as general counsel in 2011, but he did eventually withdraw Becker's nomination, offering Block and Griffin as new nominees to the Board. Yet the President did so in a way that precluded the Senate from exercising its advice-and-consent function. He sent Block's and Griffin's nominations to the Senate on December 15, 2011, a date that gave the Senate insufficient time to hold confirmation hearings during the 2011 session. *See* 157 CONG. REC. S8691 (daily ed. Dec. 15, 2011); Laura Meckler & Melanie Trottman, *Obama's NLRB Appointments: Why the Rush?* WALL STREET JOURNAL WASHINGTON WIRE (Jan. 6, 2012).[17] The Senate did not receive the nominees' committee questionnaires and background checks at that time. *See* Press Release, U.S. Senate Committee on Health, Education, Labor & Pensions,

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[16] Available at http://www.lgraham.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=24553900-802a-23ad-4cfe-05130335b0a0 (last visited Nov. 19, 2013).

[17] Available at http://blogs.wsj.com/washwire/2012/01/06/obamas-nlrb-appointments-why-the-rush/ (last visited Nov. 19, 2013).

NLRB Recess Appointments Show Contempt for Small Businesses (Jan. 4, 2012).[18]

Forty-seven Senators thus sent the President a letter on December 19, urging him not to try to use recess appointments on Block and Griffin. The Senators asked the President to instead "allow for a full and thorough review of their qualifications through regular order in the Senate." Letter from Senator Orrin Hatch to President Barack Obama (Dec. 19, 2011) (hereinafter "Dec. 19 Letter").[19] They noted that "[a]ppointments to the NLRB have traditionally been made through prior agreement of both parties to ensure that any group of nominees placed on the board represents an appropriate political and philosophical balance." *Id.* They also argued that the President's "recess appointment of NLRB Member Craig Becker is an example of an NLRB nominee having been appointed over the objection of the Senate," resulting in "controversy throughout Member Becker's entire term." *Id.* They warned that attempted recess appointments of Block and Griffin would "set a dangerous precedent" that "could needlessly provoke a constitutional conflict between the Senate and the White House." *Id.* They concluded that the Senate should be "given an opportunity to fully explore their qualifications and suitability to be Members of the NLRB through a careful and deliberative hearings and confirmation process." *Id.*

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[18] Available at http://www.help.senate.gov/newsroom/press/release/?id=170c9d76-0002-4a7d-b9b3-20185d847bbb (last visited Nov. 19, 2013).

[19] Available at http://www.nationalreview.com/corner/286200/new-nlrb-controversy-robert-verbruggen (last visited Nov. 19, 2013).

The President nevertheless announced Block's and Griffin's recess appointments on January 4. That announcement came a little more than two weeks after the Senate had entered an order scheduling pro-forma sessions every three business days to avoid an end-of-year recess. *See* 157 CONG. REC. S8783 (daily ed. Dec. 17, 2011). The President's announcement also came only one day after the Senate convened one of those pro-forma sessions, on January 3, 2012, marking the beginning of the next Session of Congress. *See* 158 CONG. REC. S1 (daily ed. Jan. 3, 2012).

Although Block and Griffin sat on the board as recess appointees for 18 months, the President and Senate eventually reached a deal that allowed the Senate to exercise its advice-and-consent function in an effective way—and to inquire into the right-to-work and ballot secrecy issues. *See* NLRB Br. 7 n.3, 58. In July 2013, the President withdrew Block's and Griffin's nominations and named Kent Hirozawa and Nancy Schiffer in their stead. *See* 159 CONG. REC. S5715 (daily ed. Jul. 16, 2013). During the confirmation hearing that followed, both nominees testified that they believed that the Board could not abrogate right-to-work laws. *See Full Committee Hearing – Hearing on National Labor Relations Board Nominees Before the S. Comm. On Health, Education, Labor, and Pensions*, 113th Cong. at 53:27-58 (Jul. 23, 2013).[20] They added that they did not understand it to be an unfair labor practice, standing alone, for an employer in a non-right-to-work State to expand its

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[20] Available at http://www.help.senate.gov/hearings/hearing/?id=169b019b-5056-a032-529b-881d2a8a9b11 at 54:08 (last visited Nov. 18, 2013).

operations in a right-to-work State. *Id.* at 55:10-25 (questions from Sen. Alexander). Senators also discussed the nominees' positions on ballot secrecy. *See id.* at 1:39:27-43:56 (questions from Sen. Scott). After this process was complete, the Senate confirmed both nominees. More recently, the Senate confirmed the President's nomination of Griffin to replace Solomon as General Counsel. *See* 159 CONG. REC. S7608 (daily ed. Oct. 29, 2013).

C. The President cannot use recess appointments to circumvent the Senate's role in safeguarding federalism.

The facts surrounding these nominations demonstrate that advice-and-consent plays a crucial role in safeguarding state sovereignty and the liberty that flows from it. Noel Canning has convincingly explained why the text, history, and purposes of the Recess Appointments Clause precluded the President from making the recess appointments at issue here. *See* Noel Canning Br. 8-70. Federalism principles bolster that conclusion. A rule that would allow the President to override this safeguard in this way would be inconsistent with the Senate's federalism-promoting structure.

The President's view of the Recess Appointments Clause is incompatible with the Framers' decision to entrust the advice-and-consent role to the Senate. "The manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 883 (1991) (internal quotation

marks omitted). It thus makes sense that the Framers assigned review of Executive appointments to the chamber they called the "instrument" for retaining state "sovereignty." THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed. 1961). Yet under the President's view, even when the States' representatives fail to develop consensus about a particular nominee, the President can, during any time he unilaterally determines the Senate to go into "recess," unilaterally appoint that same nominee to a term that lasts as long as two years. He can do so even when, as was the case here, the Senators' failure to develop consensus arose from concerns about the nominees' positions on laws that govern in a substantial number of States. And he can do so even when, as was the case here, a substantial number of Senators ask the President to defer the nominee to "a careful and deliberative hearings and confirmation process" in the Session that is to follow. *See* Dec. 19 Letter, *supra*.

That result is particularly unpalatable in the circumstances of this case. The issues surrounding these nominations were sufficiently important to the States that both Houses of Congress convened in pro-forma sessions every three days, specifically to ensure that they could "scrutinize" the President's "appointees through regular order of advise and consent." May 25 Letter, *supra*. So in going forward with the purported appointments, the President not only ignored the Senate's substantive concerns about his nominees' approach to state law and individual liberty, but also declared that the Senate was conducting a procedural sham. *See Lawfulness of Recess Appointments During a Recess of the Senate Notwith-*

standing Periodic Pro Forma Sessions, 36 Op. O.L.C. __, slip op. at 13-18 (Jan. 6, 2012). No workable understanding of the separation of powers would allow the President to act based on those sorts of judgments about a coordinate branch.

It also gets things precisely backwards for the Administration to claim that these pro-forma sessions were illegitimate because their "explicit purpose" was "a desire to deny the President the authority to make recess appointments." NLRB Br. 56. The Senate's purpose was not to deny the President's authority to make recess appointments. It was to preserve *the Senate's* authority to advise and consent. That Congress thought its authority sufficiently important as to warrant these drastic measures should have given the President more cause, not less, to iron out the concerns his coordinate branch had expressed.

The sequence of events also belies the NLRB's assertion that the States' representatives in the Senate cannot be trusted to work with the President in matters of this sort. The NLRB suggests that these appointments were necessary because the Senate effectively had "prevent[ed]" the President "from filling vacancies," thereby putting the Board in danger "of losing its quorum" in January 2012. NLRB Br. 63. But the President could have headed off that circumstance without resorting to this measure. A large number of Senators announced that they would oppose the President's original nominee, Craig Becker, no later than May 2011. Indeed, Becker had failed to secure confirmation the previous year. *See supra* at 16-18. Yet the President did not withdraw Becker's nomination until December 15, when he nominated

Block and Griffin. It is unclear why the President did not make that move earlier, at a time when the Senate still could have conducted a meaningful confirmation process. The Senate's eventual confirmation of the President's two other nominees in 2013—during which Senators were able to inquire about the right-to-work and ballot-secrecy issues that previously had caused concern—shows that the President and Senate can reach compromises in this area.

In any event, neither federalism nor separation-of-powers jurisprudence proceeds on the assumption that the various branches of government act in bad faith. Precisely the opposite is true. Just as the Constitution presupposes that the States discharge their constitutional responsibilities in good faith, *see Alden v. Maine*, 527 U.S. 706, 755 (1999), the Constitution presupposes that the States' representatives in the Senate do the same.

These considerations confirm the conclusion to which Noel Canning has pointed. No sensible system of checks and balances—or federalism—would allow the President to unilaterally make the appointments at issue in this case. At the very least, when the States' representatives in the Senate announce that they are not in recess and that they are therefore available to consider the President's nominations, proper respect for both separation of powers and state sovereignty requires the President to seek those representatives' consent before he appoints someone to an office as important as the ones at issue here.

CONCLUSION

This Court should affirm the judgment of the D.C. Circuit.

Respectfully submitted,

LUTHER STRANGE
Ala. Attorney General

John C. Neiman, Jr.*
Ala. Solicitor General
Andrew L. Brasher
Dep. Ala. Solicitor Gen'l
Megan A. Kirkpatrick
Ass't Ala. Solicitor Gen'l
OFFICE OF THE ALABAMA
ATTORNEY GENERAL
501 Washington Ave.
Montgomery, AL 36130
(334) 353-2187
jneiman@ago.state.al.us

*Counsel of Record

November 25, 2013

COUNSEL FOR ADDITIONAL *AMICI*

Thomas C. Horne
Attorney General
State of Arizona
1275 W. Washington St.
Phoenix, AZ 85007

John W. Suthers
Attorney General
State of Colorado
Ralph L. Carr Colorado
Judicial Center
1300 Broadway
10th Floor
Denver, CO 80203

Pamela Jo Bondi
Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, FL 32399-1050

Sam Olens
Attorney General
State of Georgia
40 Capitol Square, SW
Atlanta, GA 30334

Lawrence G. Wasden
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

Derek Schmidt
Attorney General
State of Kansas
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612-1597

Bill Schuette
Attorney General
State of Michigan
P. O. Box 30212
Lansing, MI 48909

Timothy C. Fox
Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620-1401

Jon Bruning
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, NE 68509

Michael DeWine
Attorney General
State of Ohio
30 E. Broad St.
17th Floor
Columbus, OH 43215

E. Scott Pruitt
Attorney General
State of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105

Greg Abbott
Attorney General
State of Texas
P.O. Box 12548
Austin, TX 78711-2548

Alan Wilson
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, S.C. 29211

Kenneth T. Cuccinelli, II
Attorney General
Commonwealth of Virginia
900 East Main Street
Richmond, VA 23219

Marty J. Jackley
Attorney General
State of South Dakota
1302 E. Highway 14,
Suite 1
Pierre, SD 57501-8501

Patrick Morrisey
Attorney General
State of West Virginia
1900 Kanawha Blvd. E
Charleston, WV 25305

AMICUS CURIAE BRIEF

RECORD
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BRIEFS

Supreme Court, U.S.
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No. 12-1281

IN THE
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF THE RESPONDENT

PETER J. FERRARA
Counsel of Record
2011 Freedom Lane
Falls Church, VA 22043
703-582-8466
peterferrara@msn.com

Counsel for Amicus Curiae
American Civil Rights Union

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to ensure that the President of the United States is subject to the rule of law.

STATEMENT OF THE CASE

On January 4, 2012, the President named Sharon Block, Terence Flynn, and Richard Griffin to the National Labor Relations Board (NLRB) as "recess" appointees. The Constitution provides for such recess appointments without Senate confirmation in Article II, Section 2, which states, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

But the fundamental problem was that the Senate was not in recess at the time of the appointments. The Senate had convened the day before to begin the second session of the 112th Congress. The Senate then convened again for business two days later.

Indeed, on December 17, 2011, the Senate, under majority control of the President's own Democrat Party, had adjourned granting unanimous consent under the following adjournment order:

> I ask unanimous consent that when the Senate completes its business today, it adjourn and convene for pro forma sessions only, with no business conducted on [December 20, December 23, December 27, December 30, January 3, January 6, January 10, January 13, January 17, and January 20] . . . and that following each pro

> forma session the Senate adjourn until the following pro forma session."

Pet.App.91a. The Senate did subsequently convene short, formal sessions on those specified days and did conduct some Senate business, such as passage of the Temporary Payroll Tax Cut Continuation Act of 2011. On January 3, 2012, the Senate fulfilled its constitutional obligation under the Twentieth Amendment to meet "at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const. Amend. XX, § 2.

The President's NLRB appointments on January 4, 2012 were consequently, in fact, actually the first time in U.S. history that a President purported to make mid-session recess appointments during a three day break in Senate business. On that day, the President unilaterally asserted that the Senate was in recess. Moreover, two of the supposed "recess" appointees – Block and Griffin – had just been submitted to the Senate as nominees for confirmation less than three weeks earlier. Their committee questionnaires and background checks had not even been submitted yet.[2]

The next week, after the President's unilateral declaration that the Senate was in recess, the Office of

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[2] Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, NLRB Recess Appointments Show Contempt for Small Businesses (Jan. 4, 2012), http://www.help.senate.gov/newsroom/press/release/?id=170c9d76-0002-4a7d-b9b3-20185d847bbb.

Legal Counsel of the Justice Department issued a memorandum asserting that the President, in his "discretion," may declare the Senate to be in recess because it is unavailable to "receive communications from the President or participate as a body in making appointments." Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. slip op. at 5 (Jan. 6, 2012). That memorandum further asserted that the Senate has no power to declare that it is not in recess because of pro forma sessions. *Id.* at 9.

Noel Canning is a family-owned soft drink bottling and distribution company in Yakima, Washington. Teamsters Local 760 alleged that Noel Canning had agreed to a collective bargaining agreement with the union regarding the company's employees represented by the union, though there was no formalized written and signed contract. An NLRB Administrative Law Judge nevertheless ruled in September, 2011 that Noel Canning violated the National Labor Relations Act by refusing to execute the alleged agreement. Pet.App.2. Noel Canning filed exceptions to the ALJ ruling with the NLRB for an appeal to the Board. Briefing on that appeal was completed by December 27, 2011, just eight days before the NLRB recess appointments at issue in this case. Resp. C.A. App. A3.

The Board affirmed the ruling of the ALJ against Noel Canning on February 8, 2012, in a panel including two of the recess appointees at issue in this case – Block and Flynn. Noel Canning promptly filed for an appeal to the United States Court of Appeals for

the D.C. Circuit challenging the legality of the recess appointments. Pet.App.2a.

Moreover, the law requires that for the NLRB to take legal action, it must have a quorum of at least three lawfully appointed members. 29 U.S.C. § 153(b); *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010). But if the three recess appointees to the NLRB at issue in this case were not validly appointed, then on the date of the Noel Canning decision, February 8, 2012, the Board had only two validly appointed members.

The D.C. Circuit held that the President's January 4, 2012 "recess" appointments to the NLRB were not lawfully appointed. Pet.App.18a-52a. The Court held that the recess appointment power in Article II, Section 2 of the Constitution applies only to "the Recess" between the two Sessions of each Congress. That is the only time during which "recess" appointments can be made. Moreover, such "recess" appointments can be made only to fill vacancies that arise during that "Recess." Therefore, the February 8, 2012 ruling of the NLRB against Noel Canning was invalidated.

This Court granted the Writ of Certiorari to review this decision of the D.C. Circuit on June 24, 2013.

SUMMARY OF ARGUMENT

The advice and consent of the Senate for Presidential appointments required by the Constitution's Appointments Clause serves the fundamental Constitutional framework of Separation

of Powers, which was embraced by the framers as the central Constitutional structure for the protection of American liberties. It serves as a powerful check and balance on the concentration of power in the hands of the President, as intended by the framers.

That diffusion of power wisely protects against possible oppression by a runaway President, whose single minded pursuit of his own certitudes in appointment of federal officers might seem imperial to those with minority views, or those holding to shifting opposing public opinions which may have even transformed into new majorities.

If the President may declare at his own discretion when the Senate is in recess, that would destroy the whole Separation of Powers check and balance on the President's Appointment Power. It would empower the President to completely evade the primary Appointments Clause required advice and consent of the Senate whenever, as here, the President fears the Senate will enforce the will of the people against unpopular, radical appointments that would flout even majority viewpoints, let alone any concern over protection for minority views.

By its very terms, the Recess Appointments Power applies to appointments made "during the Recess of the Senate...which shall expire at the End of their next Session." U.S. Const., Article II, Section 2. There is, in fact, only one "Recess of the Senate" during every Congress. That is "the Recess" between the two Sessions of every Congress, one Session taking place during the first year, and another taking place during the second year. Recess appointments consequently

can only be made during "the Recess of the Senate" between the two Sessions of every Congress.

The language of the Recess Appointments Clause also limits recess appointments only to fill vacancies which arise during "the Recess" between the two Sessions of each Congress.

This is how the court below interpreted the Recess Appointment Clause, and how it ruled. Moreover, the original understanding and predominant practice during most of the first 200 years of American history is in accord with that ruling of the court below. Indeed, no prior President has taken the position of the current Administration in asserting that the President can make a recess appointment when the Senate itself says it is not in recess. That strongly raises the specter of abuse of power, which this Court should address, and curb, restoring the original understanding of the power consistently with the language of the Constitution.

For all of these reasons, the ruling of the court below should now be affirmed.

ARGUMENT

I. THE CONSTITUTION'S APPOINTMENTS CLAUSE, REQUIRING THE ADVI CE AND CONSENT OF THE SENATE, IS PART OF THE CONSTITUTION'S SEPARATION OF POWERS, WHICH IS A FUNDAMENTAL BULWARK OF AMERICAN LIBERTIES.

The President's powers of appointment are specified in Article II, Section 2, Clause 2 of the Constitution, which states that the President,

> "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."

The Power of Appointment of federal officials was debated extensively at the Constitutional Convention, concerning "whether the power should be vested in the entire legislature, as proposed in the original Virginia Plan; in the Senate alone; in the president alone; or in the president with the advice and consent of the Senate." Michael J. Gerhardt, The Federal Appointments Process: A Constitutional and Historical Analysis 16-17 (2000).

The Power was assigned "to the President and Senate jointly," The Federalist No. 67, at 409-10, in Hamilton's words, to serve the fundamental Constitutional framework of Separation of Powers, which was embraced by the framers as the central Constitutional structure for the protection of American liberties. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010).

The required advice and consent of the Senate serves as a powerful check and balance on the

concentration of power in the hands of the President, as intended by the framers. Federalist 76, at 457 (Requiring Senate consent for appointments provided "an excellent check upon a spirit of favoritism in the President."). That diffusion of power wisely protects against possible oppression by a runaway President, whose single minded pursuit of his own certitudes in appointment of federal officers might seem imperial to those with minority views, or those holding to shifting opposing public opinions which may have even transformed into new majorities.

"This Court has repeatedly emphasized that 'the Constitution diffuses power the better to secure liberty.'" *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (quoting *Morrison v. Olson*, 487 U.S. 654, 694 (1988)). Madison himself, so central to the framing of the Constitution, warned us that the gravest threat to that Separation of Powers was "a gradual concentration of the several powers in the same department." The Federalist No. 51, at 321 (Madison) (Clinton Rossiter ed., 1961).

The Constitution provides a "general method" of appointment with the advice and consent of the Senate, Federalist 67, at 409, that serves to "check" presidential power. The Federalist No. 76, at 457 (Hamilton) (Clinton Rossiter ed., 1961). The more limited Recess Appointments Clause provides for a more limited "auxiliary method" of Presidential appointments, Federalist 67, at 409, that is by now heavily outdated. The auxiliary method was included to serve functionality in a time of far more limited, indeed, relatively primitive transportation and communications capabilities, when the most advanced

means for Congressional travel was literally the horse and buggy, and even the Pony Express for communication had not been invented yet.

In these circumstances, the more limited, and heavily outdated, auxiliary Recess Appointment Power should be interpreted narrowly to its precise terms and language. As Edmund Randolph, the nation's first Attorney General, explained, the recess-appointment power "is to be considered as an exception to the general participation of the Senate" so "[i]t ought to[] be interpreted strictly." Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), in 24 The Papers of Thomas Jefferson 165, 166 (John Catanzariti et al. eds., 1990).

II. THE RECESS APPOINTMENT POWER APPLIES ONLY WHEN THE SENATE IS IN RECESS, WHICH IS DEFINED BY THE CONSTITUTION, NOT AT THE PRESIDENT'S DISCRETION.

The Recess Appointment Power is defined in Article II, Section 2 of the Constitution, which states, "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

Petitioner NLRB argues that the power to determine when the Senate is in Recess for purposes of this Recess Appointments Clause resides with the President, who may decide that the Senate is in recess because it is unavailable to "receive communications from the President or participate as a body in making

appointments," as the President's Office of Legal Counsel has argued.

But such a blatant misreading of the Constitution would destroy the whole Separation of Powers check and balance on the President's Appointment Power. It would empower the President to completely evade the primary Appointments Clause required advice and consent of the Senate whenever, as here, the President fears the Senate will enforce the will of the people against unpopular, radical appointments that would flout even majority viewpoints, let alone any concern over protection for minority views.

During any holiday, break, or adjournment, the President would have the Constitutional power to declare the Senate in recess for purposes of the Recess Appointments Clause, regardless of what the Senate itself says, as in this case. That would render the required Advice and Consent of the Senate in the supposedly primary Appointments Clause a constitutional nullity whenever it might have the intended effect of restraining the President's power.

But it is the Senate, not the President, who determines when the Senate is in recess. See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935) ("The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there."); Laurence H. Tribe, American Constitutional Law § 4-13, at 267 (2d ed. 1988) (on "matters of legislative self-governance . . . the Constitution expressly makes each house a law unto itself"). Indeed, the Rules of Proceedings Clause

empowers each House to "prescribe a method for . . . establishing the fact that the house is in a condition to transact business" and "it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just." *Ballin v. United States*, 144 U.S. 1, 5-6 (1892).

But, ultimately, it is not even the Senate, but the Constitution, that determines when the Senate is in "the Recess" to which the Recess Appointment Power applies. The Constitution itself says that the Recess Appointment Power applies to vacancies that may happen during "the Recess" of the Senate, as quoted above.

By its very terms, the Recess Appointments Power applies to appointments made "during the Recess of the Senate...which shall expire at the End of their next Session." U.S. Const., Article II, Section 2. The use of the article "the" before Recess means that the power does not apply during just *any* recess. There is, in fact, only one "Recess of the Senate" during every Congress. That is "the Recess" between the two Sessions of every Congress, one Session taking place during the first year, and another taking place during the second year. That, in fact, is how the *Congressional Record* is denominated, by the number of the Congress, and by the number of the Session for each Congress.

That reading is consistent with the rest of the Recess Appointments Clause, which specifies that recess appointments "shall expire at the end of their next Session," their referring back to the Senate as the antecedent. The Recess between the two Sessions of

each Congress is, of course, followed by the Second Session of that Congress. That is the "next Session" to which the language refers, further indicating that it is talking about "the Recess" between the two Sessions of each Congress. Federalist 67, at 410 (Hamilton)(recess appointments "expire at the end of the ensuing session of the national Senate," ensuing meaning the appointment occurs during the Recess between the two Sessions of each Congress).

Recess appointments consequently can only be made during "the Recess of the Senate" between the two Sessions of every Congress. That means also that Recess appointments can only last up to one year, during the second Session of each Congress.

The language of the Recess Appointments Clause also limits recess appointments only to fill vacancies which arise during "the Recess" between the two Sessions of each Congress. The language of the Clause says the recess appointment power applies "to fill up all Vacancies *that may happen during* the Recess of the Senate...." U.S. Const., Article II, Section 2.

This is how the court below interpreted the Recess Appointment Clause, and how it ruled. Pet.App.18a-52a.

That interpretation is also consistent with the limited purpose of the Recess Appointments Clause, which is to provide for the government to continue to function during the more extended Recess between the two Sessions of Congress, when Members are more likely to travel home, especially for the holidays. In

horse and buggy days, with communication limited to writings hand delivered by couriers traveling by horse, members could not be contacted by the speed of sound or the speed of light, and fly back the next day, as today. So some alternative means of appointment to keep the government fully functioning during the one known extended Recess of each Congress was necessary.

It is instructive to interpretation that the Recess Appointments Clause does not say the power applies to appointments made during "*a* Recess," which would mean whenever the Senate is in any recess. Such a reading is not only inconsistent with the article "the," but also with the limitation of the period of service of any recess appointee to the end of the next Session of the Senate. If recess is read as any recess, then the next Session would end at the next recess of any sort, such as the end of the next day, or even for a lunch break. That would be an implausibly short, dysfunctional period of service. So that could not be what the Recess Appointments Clause means.

Moreover, if recess appointments were not limited to "the Recess" between the two Sessions of each Congress, then recess appointees could serve until the end of not only the Session during which they were appointed, but until the end of the following Session as well. This would be the result under the language of the Recess Appointments Clause, which provides for recess appointees to serve until "the End of [the] next Session." U.S. Const., Article II, Section 2. That can be as much as two years for a recess appointee, way too long for appointments that bypass the advice and consent of the Senate. Two years is half a presidential

term, a full term for a member of the House, and nearly as long as most Senate-confirmed officers serve. See, e.g., Matthew Dull & Patrick S. Roberts, Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989–2009, 39 PRES. STUD. Q. 432, 436 (2009) (Senate-confirmed officers in recent Administrations served for a median 2.5 years).

Moreover, that is not necessary, given the purpose of the Recess Appointment Power to keep the government functioning during the limited time the Senate is not available to provide advice and consent. Once the Senate gets back from "the Recess," there is plenty of time for it to consider and confirm a nominee. 3 Joseph Story, Commentaries on the Constitution of the United States § 1551 (1833)(recess appointments "should expire[] when the senate should have had an opportunity to act on the subject.").

III. THE RULING OF THE COURT BELOW FOLLOWS THE PRACTICE REGARDING THE RECESS APPOINTMENT POWER FOR MOST OF THE FIRST 200 YEARS OF AMERICAN HISTORY.

The original understanding and predominant practice during most of the first 200 years of American history is in accord with the ruling of the court below regarding the parameters of the recess appointment power. Apart from disputed history regarding recess appointments during the immediately post-Civil War Presidency of Andrew Johnson, none of the other 27 Presidents from 1789 to 1921 even tried to make a recess appointment outside the Recess of the Senate

between the Sessions of each Congress. S. Pub. 112-12, Official Congressional Directory, 112th Congress (2011), at 17-18. That strongly suggests the "assumed absence" of the power. *Printz v. United States*, 521 U.S. 898, 908 (1997).

That includes the practice and understanding of federal officials during the Administrations of the first four American Presidents, which reflects the original understanding of the Recess Appointment Power. Randolph Opinion at 166; see also To George Washington from Charles Lee, 7 July 1796, Founders Online, National Archives (similar opinion by Washington's second Attorney General, Charles Lee); Letter from James McHenry to Alexander Hamilton (Apr. 26, 1799), in 23 The Papers of Alexander Hamilton 69, 70 (Harold C. Syrett ed., 1976); Letter from Alexander Hamilton to James McHenry (May 3, 1799), in 23 The Papers of Alexander Hamilton, supra, at 94; Letter from John Adams to J. McHenry (May 16, 1799), in 8 The Works of John Adams 647, 647 n.1 (Charles Francis Adams ed., 1853); Letter from Thomas Jefferson to James Monroe (Feb. 15, 1801), in 9 The Works of Thomas Jefferson 178, 179 (Paul Leichester Ford ed., 1905); Letter from Thomas Jefferson to Tench Coxe (Feb. 11, 1801), in 3 Memoirs, Correspondence, and Private Papers of Thomas Jefferson 459, 459 (1829); James Madison: Paper on relations with Andrew Jackson, December 1823, Founders Online, National Archives, http://founders.archives.gov/documents/Madison/99-02-02-0 103; Letter to Wilson Cary Nicholas (Jan. 26, 1802), in 36 The Papers of Thomas Jefferson 433, 433 (Barbara B. Oberg ed., 2009).

In 1921, Attorney General Daugherty ruled that recess appointments could be made outside the Recess between the two Sessions of each Congress if it was "impossible" to obtain the advice and consent of the Senate for an appointment, due to an extended, longer term, intrasession recess. 33 Op. Att'y Gen. 20, 25. But mid-Session appointments did not become common until the late 1970s and, even then, there was consistent congressional resistance.

No prior President, however, has taken the position of the current Administration in asserting that the President can make a recess appointment when the Senate itself says it is not in recess. That strongly raises the specter of abuse of power, which this Court should address, and curb, restoring the original understanding of the power consistently with the language of the Constitution.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that the ruling of the court below should be affirmed.

Respectfully Submitted,

PETER J. FERRARA
Counsel of Record
2011 Freedom Lane
Falls Church, VA 22043
703-582-8466
peterferrara@msn.com
Counsel for Amicus Curiae
American Civil Rights Union

November 25, 2013

AMICUS CURIAE BRIEF

No. 12-1281

RECORD
AND
BRIEFS

U.S.
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IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE ATLANTIC LEGAL FOUNDATION AND THE JUSTICE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

MARTIN S. KAUFMAN
ATLANTIC LEGAL FOUNDATION
2039 Palmer Avenue, #104
Larchmont, New York, 10538
(914) 834-3322

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
STEPHEN J. OBERMEIER
WILEY REIN LLP
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
SUPREME COURT CLINIC
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
wconsovoy@wileyrein.com

Attorneys for Amici Curiae

November 25, 2013

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INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm with a demonstrable history of advancing the rule of law in courts and before administrative agencies by advocating limited and efficient government, free enterprise, individual liberty, school choice, and application of sound science in legal proceedings. It provides effective and decisive legal representation, without fee, to parents, scientists, educators, and other individuals, corporations, and trade associations.

The Justice Foundation is dedicated to protecting the fundamental freedoms and rights essential to the preservation of American society. It represents clients free of charge in cases in the areas of limited government, free markets, private property, parental school choice, parental rights in education, and enforcing laws to protect women's health.

Amici curiae have a vital interest in ensuring that the Constitution's structural protections remain a bulwark of individual liberty. The interests of *amici curiae* are directly implicated by this important case. The correct interpretation of the Recess Appointments Clause raises fundamental questions concerning the separation of powers that squarely affect the missions of both organizations.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

"The Appointments Clause sets out the respective powers of the Executive and Legislative Branches with admirable clarity." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring). Under Article II, "[t]he President has the sole responsibility for nominating [principal] officials, and the Senate has the sole responsibility of consenting to the President's choice." *Id.* "The Framers understood ... that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." *Freytag v. Commissioner*, 501 U.S. 868, 884 (1991). "It is not easy to conceive a plan better calculated than this to promote a judicious choice of men for filling the offices of the Union[.]" The Federalist 76, at 510 (A. Hamilton) (Jacob E. Cooke ed., 1961).

"Where a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself," and the Court may not "rewrite the particular balance of power that the Constitution specifies among the Executive, Legislative, and Judicial Departments." *Public Citizen*, 491 U.S. at 486-87 (Kennedy, J., concurring). The government nonetheless asks this Court to do just that by converting a narrow exception allowing the President to "fill up all Vacancies that may *happen* during *the Recess* of the Senate," U.S. Const. art. II, § 2, cl. 3 (emphases added), into a sweeping grant of unilateral executive authority to make such appointments whenever a vacancy may "*exist*" during any "period of cessation from usual work," Brief for the United States ("U.S. Br.") at 7-8.

The government's view is incompatible with the text, structure, purpose, and history of the Recess Appointments Clause. The Clause allows recess appointments that arise—and are then filled by the President—during a break between legislative sessions. Article II makes plain that "the Recess" occurs between a legislative Session and the "next Session." U.S. Const. art. II, § 2, cl. 3. The parties agree that the "Session" refers to Congress's annual assembly in which it formally conducts business. *See* Brief for Respondents ("Resp. Br.") at 11-12; U.S. Br. at 17. Textually, then, "the Recess" must be the period between the two sessions. This is not intricate draftsmanship.

The government tries to complicate a relatively staightforward question of textual interpretation by inventing the concept of an "intra-session" recess based on generic dictionary definitions. But the dictionaries are not as favorable to the government's position as its brief suggests, and the generic definition does not control. The Constitution already has a name—"adjournment"—for breaks "during the Session of Congress." U.S. Const. art. I, § 5, cl. 4. By defining "the Recess" and "adjournment" interchangeably, the government thus ignores a longstanding rule of interpretation: "It cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

Like "the People," "Ex Post Facto" and other similar concepts used throughout the Constitution, "the Recess" is a term of art that had an established meaning at the time of the Founding. *See generally* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487 (2005). As pre-Independence

British history shows, "the Recess" was understood to encompass only breaks between legislative sessions—not during one. That understanding carried over to colonial America, to the Articles of Confederation, to various state constitutions, to the First Congress, and to the Washington Administration. This historical background shaped and reflects the Framers' conception of the words they chose and confirms what is already clear from the Constitution itself, *viz.*, that "the Recess" is a defined concept, not a generic term describing any random adjournment.

But even were the President empowered to make recess appointments during intra-session adjournments, which he is not, the government cannot reconcile its position with the requirement that the vacancies at issue "happen" during the Recess. "A vacancy happens ... only when it first arises, demonstrating that the Recess Appointments Clause requires that the relevant vacancy arise during the recess." *Noel Canning v. NLRB*, 705 F.3d 490, 507 (D.C. Cir. 2013). The claim that a vacancy perpetually "happen[s]" every day it "exists" does not pass scrutiny. Just like any singular event, a vacancy happens on a specific day. Interpreting "happen" to mean "exist" effectively reads the word out of the document or, at a minimum, attributes to it the trivial and unusual role of preventing the President from filling future vacancies via recess appointment. *See* U.S. Br. at 31. Including words or phrases with little or no discernible meaning was not the Framers' habit.

Confining recess appointments to vacancies arising during breaks between sessions also advances the Clause's purpose. The constitutional rule is "Advice and Consent," U.S. Const. art. II, § 2, cl. 2, and the

Framers chose to lodge that power in the Senate. "The Spirit of the Constitution favors the participation of the Senate in all appointments," so the Clause must "be interpreted strictly." Edmund Randolph, Opinion on Recess Appointments (July 7, 1792). The government's interpretation of the Recess Appointments Clause would run roughshod over the constitutional plan. It would permit recess appointments during *any* Senate adjournment and allow the President to fill a vacancy that occurred while the Senate was in session, encouraging the very inter-branch gamesmanship this case exhibits. Recess appointments are an exception designed to accommodate the Executive's need to fill important posts while the Senate is away for months between sessions, not an ingenious means for the President to circumvent the Senate anytime his nominations meet with resistance.

The government claims function supersedes form, but not where it concerns structural protections. While "minor adjustments might be seen as desirable attempts to modernize the original constitutional provisions, ... where the Constitution draws a clear line, [the Court] may not engage in such tinkering." *Public Citizen*, 491 U.S. at 486 (Kennedy, J., concurring). Claims of public necessity in the name of expediency, moreover, ring hollow, and the doomsday scenarios the government posits here are no different. The President has the power to call a special session of the Senate to act on a nomination requiring immediate action, as has been done many times in the past. *See* U.S. Const. art. II, § 3. If the vacancy is not urgent, it can await the Senate's return.

The government's last line of defense is a claim to tradition. But history undermines the contention that the

President may make recess appointments during intra-recess adjournments. There were none for the 80 years following the Constitution's ratification, and only two before 1947. The intra-session appointment is a novelty of the last half-century. That is not a pedigree meriting veneration. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 907-09 (1997); *INS v. Chadha*, 462 U.S. 919, 951 (1983). What counts for constitutional purposes is the understanding of the terms used in the Clause at the time of the Founding and in the years immediately following it.

What the government calls "tradition" is in truth a mostly recent effort by Presidents to concentrate power in their hands. The increasing frequency of intra-session appointments is thus cause for concern. "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring). That is why "[i]t remains one of the most vital functions of this Court to police with care the separation of the governing powers. ...When structure fails, liberty is always in peril." *Public Citizen*, 491 U.S. at 468 (Kennedy, J., concurring).

Nor does the government's overblown assertion of Senate acquiescence answer the separation of powers concern. Even accepting the argument's validity, "[t]hat a congressional cession of power is voluntary does not make it innocuous. ... Abdication of responsibility is not part of the constitutional design." *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring). The Court is tasked with the ultimate responsibility of preserving

the Constitution's balance of power even when one of the political branches will not protect itself. The Court should exercise that solemn responsibility by affirming the D.C. Circuit's decision and declaring unconstitutional the three recess appointments to the National Labor Relations Board ("NLRB") at issue here.

ARGUMENT

I. The Constitution's Text Demonstrates that the Recess Appointments Clause Applies Only to Vacancies that Arise and Are Filled Between Legislative Sessions.

Under the Appointments Clause, "[t]he President ... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States ... ." U.S. Const. art. II, § 2, cl. 2. The Recess Appointments Clause then provides a narrow exception to this rule. It provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Id.* cl. 3.

When interpreting the Constitution, the Court must "begin with its text." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Two terms —"the Recess" and "happen"— thus demarcate the authority the Recess Appointments Clause vests in the Executive to make temporary appointments without the Senate's advice and consent. The plain meaning of those terms—taken together and viewed individually—demonstrates that the vacancy must arise

and be filled during the same break between a Session of Congress for the recess appointment to be valid under Article II. The recess appointments under review do not meet either of these requirements. *See Noel Canning*, 705 F.3d at 498-99.

"the Recess." The Constitution contemplates that the Senate will conduct formal business when in "Session," and there will be at least one "Session" each calendar year. U.S. Const. art. I, § 4, cl. 2 ("The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.").[2] "Neither House, during the Session of Congress, shall without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting." *Id.* § 5, cl. 4. The "Session" ends either upon adjournment *sine die*, *see Noel Canning*, 705 F.3d at 512 & n.1, or "automatically at the time appointed by law for the start of a new session," U.S. Br. at 12 n.5 (citing Thomas Jefferson, A Manual of Parliamentary Practice § LI, at 166 (2d ed. 1812)).

The existence of this defined period of time during which the Senate will be in "Session" necessarily connotes the existence of a break between one "Session" and the beginning of the "next Session" when the Senate will be unavailable to act on Presidential nominations or conduct other Senate business. This period of time is "the Recess," during which the President may temporarily fill vacant

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2. Article I, Section 4, Clause 2 was revised by Section 5 of the 20th Amendment. *See* U.S. Const. amend. XX, § 5 ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.").

offices without Senate advice and consent. From a textual perspective, the Clause's architecture is not complicated.

The government seeks to sever the relationship between the "Session" and "the Recess," in which the Senate is either in "Session" or in "Recess," but never both at the same time. In its view, the President also may make appointments during a so-called "*intra*-session" recess, which it defines as an adjournment "to a specified time or date" when the Senate "typically resumes the business of its current session" upon reconvening. U.S. Br. at 12. But the Constitution independently provides for such breaks—*i.e.*, it provides for intra-session "adjournment[s]" distinct from "the Recess." *See Noel Canning*, 705 F.3d at 500. Congress "may adjourn from day to day," but neither chamber "*during the Session of Congress*" may "adjourn for more than three days" without the other's concurrence. U.S. Const. art. I, § 5 (emphasis added); *id.*, art. I, § 7; *id.*, art. II, § 3 (referring to "Adjournment").[3]

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3. The North Carolina Constitution, which likely served as the model for the Recess Appointments Clause, *see* Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 Colum. L. Rev. 1758, 1770-72 (1984), also distinguished the "recess" from an "adjournment." *Compare* N.C. Const. of 1776, art. XX, reprinted in 7 Sources and Documents of United States Constitutions 406 (1978) ("That in every case where any officer ... shall, during *their recess*, die, or his office by other means become vacant, the Governor shall have power, with the advice of the Council of State, to fill up such vacancy, by granting a temporary commission, which shall expire at the end of the next session of the General Assembly.") (emphasis added), *with id.* art. X ("That the Senate and House of Commons, when met, shall each have power to choose a speaker and other their officers; be judges of the qualifications and elections of their members; sit upon their own

An adjournment "during the Session of Congress" therefore must mean something different from "the Recess." Failing to distinguish between the two concepts would "disregard ... the elementary canon of construction which requires that effect be given to each word of the Constitution." *Knowlton v. Moore*, 178 U.S. 41, 87 (1900). Had the Framers considered adjournments "during the Session of Congress" part of "the Recess," the Constitution's text would so indicate. *See Wright v. United States*, 302 U.S. 583, 588 (1938) ("The many discussions which have taken place upon the construction of the constitution, ... have ... shown the high talent, the caution, and the foresight of the illustrious men who framed it. *Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.*" (citation and quotation marks omitted) (emphasis added)).

The government also cannot reconcile its view with the Clause's structure given that a recess appointee's commission expires at "the End of [the Senate's] next Session." U.S. Const. art. 2, § 2, cl. 3. The "next Session" refers to the next annual session of Congress—not the next meeting following an adjournment, *see NLRB v. Enterprise Leasing Co. Se., LLC*, 722 F.3d 609, 645 (4th Cir. 2013), and the government has not suggested otherwise, *see* Resp. Br. at 11-12. Thus, an intra-recess appointment would last quite a bit longer than one made during the true Recess under the government's reasoning.

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adjournments from day to day, and prepare bills, to be passed into laws. The two Houses shall direct writs of election for supplying intermediate vacancies; and shall also jointly, by ballot, *adjourn themselves to any future day and place*.") (emphases added).

See id. at 11-13. As the Fourth Circuit explained, "the Senate's reconvening and first subsequent adjournment—whether that be for a long intrasession break or for the intersession break—would have no immediate effect on the recess appointment because the appointment lasts until the 'next Session,' as demarked by adjournments *sine die*." *Enterprise Leasing*, 772 F.3d at 645 (citation omitted).

In contrast, the Clause operates sensibly only if "the Recess" is confined to breaks between legislative sessions. Unlike the government's approach, it allows the President to make a recess appointment while the Senate is away and allows the appointee to remain in office until the Senate has had precisely one Session to fulfill its advice and consent function. It is therefore the only interpretation that allows the Clause to retain "an auxiliary role." *Id.* (citation omitted).

Instead of confronting these defects in its reasoning, the government looks to Founding-era dictionaries to buttress its interpretation of "the Recess" to mean any "period of cessation from usual work." U.S. Br. at 13 (citations and quotation marks omitted). As an initial matter, the contemporaneous dictionaries do not favor this reading. The common understanding of "recess" at the time of the Framing signified a degree of finality consistent with the long break that usually followed the end of a legislative session. *See, e.g.*, 2 Samuel Johnson, A Dictionary of the English Language 464 (6th ed. 1785) (defining "Recess" as "retirement; retreat; withdrawing; secession" or "[d]eparture" and "[r]emoval to distance"); 2 Frederick Barlow, The Complete English Dictionary, 323 (1772) (defining "Recess" as "Retirement. Secession").

The government's position suffers from a more a fundamental problem: a "recess" and "*the* Recess" are not the same thing. *See Noel Canning*, 705 F.3d at 499-500; Resp. Br. at 11. At the Framing, "the" is "the article noting a particular thing." 2 Samuel Johnson, A Dictionary of the English Language 835 (6th ed. 1785); 2 Frederick Barlow, The Complete English Dictionary 432 (1772) (defining "the" as "the article denoting a particular thing"). By contrast, "a" generally "signifies something indefinite." *Id.* at 4. The deliberate choice of "the" over "a" was a textual directive indicating "the Recess" is a term of art, unlike "adjournment," which is never preceded in the Constitution by "the" or any other signal that it had a specialized meaning. *See, e.g.*, U.S. Const. art. I, § 7, cl. 2-3, art. 2, § 3, cl. 1.[4] Consequently, "the Recess" must be interpreted according to the particular meaning denoted by the text of the Constitution irrespective of whether that meaning coincides precisely with the generic dictionary definition of a "recess."

United States v. Verdugo–Urquidez, 494 U.S. 259 (1990), and *Collins v. Youngblood*, 497 U.S. 37 (1990), illustrate the point. In *Verdugo-Urquidez*, the Court did not turn to dictionaries for guidance when interpreting "the People" in the context of the Fourth Amendment even though the ordinary definition of "person" was far broader than "a class of persons who are part of a

4. The only other time the Constitution uses "Recess" it also is preceded by "the." The so-called Senate Vacancies Clause—which was revised by the Seventeenth Amendment—provides that "if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." U.S. Const. art. I, § 3, cl. 2.

national community or who have otherwise developed sufficient connection with this country to be considered part of that community." 494 U.S. at 265. Likewise, *Collins* interpreted the Ex Post Facto Clause of Article I, Section 10 to apply "only to penal statutes which disadvantage the offender affected by them" notwithstanding the fact that "the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact[.]'" 497 U.S. at 41 (citation omitted). In both cases, the Court understood that the Framers intentionally had chosen "a term of art with an established meaning at the time of the framing of the Constitution." *Id.*; *see also Verdugo-Urquidez*, 494 U.S. at 265 ("'[T]he people' seems to have been a term of art employed in select parts of the Constitution.").

The key historical indicators show that "the Recess" was a term of art meaning a break between legislative sessions—not during one. Contrary to the government's assertion, *see* U.S. Br. at 14, this conception of "the Recess" follows directly from the British model, *see* Rappaport, *supra*, at 1550-53. As Professor Rappaport explained:

> In England, there were three types of breaks in legislative proceedings. First, an adjournment was a break in the business of a house that occurred during the legislative session. An adjournment was called by a house and could be of extremely short duration. Second, a prorogation was an order by the King that would end the session for both houses. The resulting break in the business of the Parliament would eventually be followed by a new session. Finally, a dissolution would end the Parliament and require elections for a new Parliament. A dissolution could occur through

> a proclamation by the King, through the death of the King, or after the Parliament had lasted for seven years.

Id. at 1550-51 & nn. 192-94 (collecting sources).

The Constitution borrows these concepts, and then modifies them "to eliminate the monarch's role" where necessary to reconcile the regime with the republican form of government. *Id.* at 1551. Because "[a]djournments did not involve the King ... they were retained," while "the King's role was omitted" from dissolutions so that only those "that occurred after a term of years" were carried over to the Constitution. *Id.* (citation omitted). "Thus, every two years, the entire House of Representatives and one third of the Senate would be newly elected." *Id.* (citations omitted). Last, the Constitution "eliminated prorogations by the monarch," allowing that power to reside exclusively in "the two houses." *Id.* (citation omitted). Likely because the term "was associated with a monarchial prerogative ... [and] thought to be inappropriate for a republic," however, the Framers instead "used the term 'recess,' which previously had been employed with this meaning in American law" to "refer to breaks between sessions." *Id.* (citations omitted).[5]

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5. This British approach carried over into state constitutions, including the Massachusetts Constitution of 1780. *See id.* at 1552. The Massachusetts Constitution granted the Governor, "with advice of Council," the "full power and authority, during the session of the General Court, to adjourn or prorogue the same at any time the two Houses shall desire." Mass. Const. of 1780, pt. 2, ch. 2, § 1, art. V. But "in the recess of the said Court," the Governor could "prorogue the same from time to time, not exceeding ninety days in any one recess; and to call it together

Contrary to the government's suggestion, *see* U.S. Br. at 15, the Articles of Confederation also support the distinction between "the Recess" and an "adjournment." The Articles allowed for the creation of a "Committee of the States" consisting of one delegate from each state to be appointed by the Continental Congress "to sit in *the recess* of Congress" and vested that Committee with the authority "to execute, in *the recess* of Congress, such of the powers of Congress as the United States in Congress assembled." Articles of Confederation, art. IX and X (emphases added). The Articles used the terms "adjourn" or "adjournment" to refer to breaks within sessions. *See id.*, art. IX, cl. 6 (recognizing that the Continental Congress would "adjourn" from "day to day"); *id.* cl. 7 (providing that "no period of adjournment" would "be for a longer duration than the space of six months"). By necessary implication, then, a Committee of the States could *not* exercise the powers of the Continental Congress during an adjournment.

During the Continental Congress's tenure, the Committee was appointed only during a break between sessions and never during an adjournment. *Compare* 26 J. of the Continental Congress 295-96 (1784) ("So it was Resolved, That the President be, and he hereby is

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sooner than the time to which it may be adjourned or prorogued, if the welfare of the Commonwealth shall require the same." *Id.* The Massachusetts Constitution therefore draws the same line between an adjournment and prorogations as in England. There could only be an adjournment "during the session" because prorogation was the break that occurred "in the recess." *See* Rappaport, *supra*, at 1552.

authorized and directed to adjourn Congress on the third day of June next, to meet on the thirtieth day of October next at Trenton, for the despatch of public business, and that a committee of the states shall be appointed to sit in the recess of Congress."), *with* 24 J. of the Continental Congress 410 (1783) (appointing no committee for 4-day adjournment); 25 J. of Continental Congress 807-09 (1783) (appointing no committee for 21-day adjournment); 27 J. of Continental Congress 710 (1784) (appointing no committee for 17-day adjournment).[6]

Finally, the First Congress understood "the Recess" to refer to breaks between sessions and not breaks during a session. Beginning in 1789, Congress adopted a payment scheme for the Senate clerk that included "two dollars per day *during the session*, with the like compensation to such clerk while he shall be necessarily employed *in the recess*." Joseph Gales, 2 Annals of the Congress of the United States 2236-38 (September 22, 1789) (1834) (emphases added). In 1791, the Senate passed The Excise or Duties on Distilled Spirits Act, which provided that "the inspectors of surveys, or any part of them, shall not be made *during the present session of Congress*, the President may, and he is hereby empowered to make such appointments, during *the recess* of the Senate, by granting commissions, which shall expire at the end of their next session." 1 J. of the

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6. The government incorrectly contends that the 5-month break in 1784 during which the Committee was convened was intra-session because it was scheduled to end before the next session began. *See* U.S. Br. at 15. That ignores the specific reference to "the recess" in the Journals and Congress's failure to reconvene until the start of the next session. *See* 28 J. of Continental Congress 639–41 (1785) (convening "[p]ursuant to the Articles of Confederation" rather than the previous adjournment); *see also* Resp. Br. at 22 n.15.

Senate 263-64 (1791) (emphases added). Both of these statutes are incompatible with an interpretation treating "the Recess" and "adjournment" interchangeably; and a statute "passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument, ... is contemporaneous and weighty evidence of its true meaning." *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U.S. 265, 297 (1888) (citation omitted); *see infra* at 28-31.

In sum, "the Recess" is a parliamentary term of art referring to breaks between legislative sessions—not an "adjournment" during one. That understanding not only follows from the term's ordinary meaning, but unlike the government's ahistorical approach, keeps faith with the concept's British lineage and the contemporaneous usage by the States. Because the NLRB recess appointments at issue were not made during such a break, *see Noel Canning*, 705 F.3d at 498-99, that should be the end of the matter.

"Happen." The NLRB vacancies at issue also did not "happen" during any congressional recess—intra-session or otherwise. For several reasons, "happen" must mean to arise at a point certain. Foremost, this reading best reflects the understanding of the term at the time of the Framing. In the 18th century lexicon, "happen" meant "[t]o fall out; to chance to come to pass." 2 Samuel Johnson, A Dictionary of the English Language 928 (6th ed. 1785); *see also* 2 Frederick Barlow, The Complete English Dictionary, 8 (1772) (same). A vacancy thus "come[s] to pass" on the date it arises. Indeed, only this construction of "happen" is compatible with the term's use elsewhere in the Constitution. *See Noel Canning*, 705 F.3d at 508

(discussing the Senate Vacancies Clause of Article I, Section 3); *see also* Resp. Br. at 33-34.

The government attempts to avoid this unequivocal meaning of "happen" by focusing on the term "vacancy." According to the government, a "vacancy" arising during a recess continues to "happen" for the entire time the position is unfilled. U.S. Br. at 29-30. But the government confuses an occurrence with a condition. *See* Resp. Br. at 34. Thus, although a vacancy (like any condition) exists until the position is filled, it "happens" on a specific date (like any occurrence). The plain meaning of "happen" simply cannot bear the weight of the government's construction. *See* 3 Joseph Story, Commentaries on the Constitution of the United States § 1553 (1833) ("The word 'happen' ... had relation to some casualty, not provided for by law."); *see also Schenck v. Peay*, 21 F. Cas. 672, 674 (C.C.E.D. Ark. 1869) (holding that appointment of various tax commissioners was contrary to the Recess Appointments Clause because the vacancies "may have existed, but did not happen, during the recess of the senate"); *Case of the Dist. Attorney*, 7 F. Cas. 731, 735 (E.D. Pa. 1868) (rejecting the recess appointment of a U.S. Attorney because reading "happen" to mean "exist" "is not conformable to either the literal or the ordinary import of the words").

The government's interpretation runs into another textual roadblock: reading "happen" as "exist" effectively writes it out of the Recess Appointments Clause. Resp. Br. at 34-35. There is no difference between "Vacancies that may [exist] during the Recess" and "Vacancies ... during the Recess." As the Court has explained, "every word must have its due force, and appropriate meaning;

for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Wright*, 302 U.S. at 588 (citation and quotations omitted).

The government makes the strained claim that "happen" would not be surplusage under its interpretation because it keeps the President from filling "a known *future* vacancy" as opposed to "vacancies that actually do exist during the recess ... ." U.S. Br. at 31. The use of the word "vacancy" already accomplishes that objective since a "future vacancy" is no vacancy at all. *See* Resp. Br. at 35. The President cannot "fill up" a position that is presently occupied. In any event, the government offers no evidence that the sole function of "happen" is to keep the President from filling offices that are occupied. Absent such evidence, there is no reason to believe that "happen" was used by the Framers for such a narrow and trivial purpose. *See, e.g.*, *Coy v. Iowa*, 487 U.S. 1012, 1018 n.2 (1988) (rejecting a proposed interpretation of the Confrontation Clause because "the phrase 'be confronted with the witnesses against him' [would be] an exceedingly strange way to express a guarantee of nothing more than cross-examination").

That the government can point to a few examples of the advice-and-consent process being used to fill not-yet-vacant offices, *see* U.S. Br. at 31 n.21, does not alter the conclusion given the distinct constitutional anchor relied on in those instances. After all, the Appointments Clause concerns the President's power to "nominate" and the Senate's power to confirm, while the Recess Appointments Clause concerns the President's unilateral authority to "fill up vacancies that may happen ... ." Whether a nomination under the Appointments Clause must await a

vacancy thus is a different question from the one presented by this case.

The issue here, in other words, is not whether an appointment under the Appointments Clause can be made on the day the officeholder announces impending plans to depart, the day of resignation, or at some point in between. The issue is whether, under the Recess Appointments Clause, the vacancy happened on a particular day or the vacancy perpetually happens each day until the office is filled. The government's anecdotes shed no light on how this question should be answered.

The Executive's interpretation at the Framing and for many years thereafter of "happen" to mean "arise" is far more pertinent than the government's anecdotes. Resp. Br. at 36-40. The first Attorney General Opinion issued by Edmund Randolph directly addressed the issue, stating that a vacancy that "commenced" on a specific day "may be said to have *happened* on that day." Edmund Randolph, Opinion on Recess Appointment (July 7, 1792). The Randolph Opinion explained that only in "a case of necessity" could "advice and consent" be bypassed, and he provided three instances where that high bar would be met: (1) when "the Officer has died ... during the recess," (2) when "the Officer has ... resigned during the recess," or (3) when the "person appointed during the Session shall not notify his refusal to accept, until the recess." *See id.* In all three examples, the vacancy arose during the Recess and did not just "happen to exist" during one. This contemporaneous evidence of the Clause's meaning cuts sharply against the government's position.[7]

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7. The first Attorney General Opinion attempting to justify the "exist" interpretation of "happen" was Attorney General

II. Limiting Recess Appointments to Vacancies that Arise and Are Filled Between Sessions Advances the Clause's Purpose.

Not only does Respondent's interpretation of the Recess Appointments Clause vindicate the constitutional text, it ensures that the Clause's limited purpose is not overridden through Executive encroachment. The Framers decided that the "ordinary power of appointment [would be] confined to the President and Senate *jointly*[.]" The Federalist 67, at 455 (A. Hamilton) (Jacob E. Cooke ed., 1961) (emphasis in original). Thus, they viewed "advice and consent" as the default mechanism for those executive appointments for which "the senate should have had an opportunity to act on the subject." 3 Story, *supra*, § 1551.

The decision was informed by important separation-of-powers concerns. *See* Resp. Br. at 66-68. By lodging approval of principal federal officers in the Senate, the Framers sought to curtail abuses they had experienced under British rule. *See Freytag*, 501 U.S. at 883-84. They rightly viewed the Appointments Clause as an "efficacious source of stability in the administration" and an "excellent check upon a spirit of favoritism ... appointment of unfit characters ... family connection ... or ... popularity." The Federalist 76, at 513. In the words of Gouvernor Morris, "as the President was to nominate, there would be responsibility, and as the Senate was to concur, there

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Wirt's letter to President John Quincy Adams in 1823. *See* 1 Op. Att'y Gen. 631 (1823). Even he, however, conceded that the "arise interpretation was the more 'natural sense' of the language and was more 'accordant with the letter of the constitution.'" Rappaport, *supra*, at 1504-05 (quoting 1 Op. Att'y Gen. 631 (1823)).

would be security." 2 Max Farrand, The Records of the Federal Convention of 1787 539 (1911); *see also Weiss v. United States*, 510 U.S. 163, 186 (1994) (Souter, J., concurring).

The Framers also appreciated the difficulties associated with Senate confirmation and accommodated the concern. First, "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. "A degree of flexibility was thought appropriate in providing for the appointment of officers who, by definition, would have only inferior governmental authority." *Weiss*, 510 U.S. at 186-187 (Souter, J., concurring) (citation omitted). The Framers required Senate participation in the appointment to those federal offices for which a check on Executive abuse was deemed indispensable. Even then, however, they carefully "structured the alternative to ensure accountability and check governmental power: any decision to dispense with Presidential appointment and Senate confirmation is Congress's to make, not the President's, but Congress's authority is limited to assigning the appointing power to the highly accountable President or the heads of federal departments, or, where appropriate, to the courts of law." *Id* at 187 (citation omitted).

Second, even with regard to the appointment of principal officers, the Framers understood that the Senate could not be "perpetually in session" to provide advice and consent without being "burdensome to the senate, and expensive to the public." 3 Story, *supra*, § 1551. It "would have been improper to oblige this body to be continually in

session for the appointment of officers." The Federalist 67, at 455. Indeed, Hamilton predicted that the Senate would be in session for merely "a third" of the year and the House for "a fourth," The Federalist 84, at 586 (A. Hamilton) (Jacob E. Cooke ed., 1961), and given the difficulties with travel at the time, the Senate could not be expected to be quickly recalled to provide "advice and consent," Raoul Berger, Federalism: The Founders' Design 23-24 (1987).

Ultimately, then, the Framers limited the federal offices for which advice and consent would be required, and provided, through the Recess Appointments Clause, an "*auxiliary* method of appointment, in cases to which the general method was inadequate." Federalist 67, at 455 (emphasis added). And by making the Recess Appointments power limited in "time" (only during "the Recess") and in "duration" (with an expiration at the end of the "next Session"), *id.*, the Framers ensured the exception would not swallow the rule. It comes as no surprise, then, that the Recess Appointments Clause was ratified at the Philadelphia Convention with little or no debate. *See* 2 The Records of the Federal Convention 540 (1787). "The propriety of this grant is so obvious, that it can require no elucidation." 3 Story, *supra*, § 1551.

There is nothing "obvious" about the "propriety" of the government's conception of the Recess Appointment power. The view that "the Recess" constitutes any "period of cessation from usual work," U.S. Br. at 7, would allow the President to make an appointment if the Senate adjourns for one hour. The most the government will say is that adjournments of three days or less do not qualify as recesses because "such short ... breaks ... do not genuinely render the Senate unavailable to provide advice

and consent . . . ." *Id.* at 18. But that invented limitation on "period of cessation" is devoid of any principle rooted in the Constitution, *see* Resp. Br. at 14, or in the meaning of the words the government uses, and, regardless, would permit the President to make a recess appointment if the Senate adjourns for merely four days. In short, the government's interpretation would eviscerate the Clause's role as a narrow exception to the rule of advice and consent for important federal offices.

The government's interpretation of "happen" is even more destructive of the constitutional balance as it would allow the President to manipulate the appointments process to evade Senate oversight. If "happen" means any vacancy that "happens to exist" during a recess, the President could just wait for the next "Recess" to fill that vacancy even if it arose on the first day of a legislative session that lasted for nine months. And to add insult to injury, the government's construction of "happen" coupled with its expansive interpretation of "the Recess" would mean that the President would not even have to wait long at all to circumvent Congress—the next intra-session break would be just around the corner. Whatever else might be worthy of debate, the Framers could not have intended for the President to so easily avoid the Senate's joint role under the Appointments Clause.

The government incorrectly claims that the Framers could not have supported Respondent's interpretation of the Clause because it would undermine the Executive's ability to faithfully execute the laws during long intra-session breaks. *See* U.S. Br. at 19-20. The government confuses its self-serving concern with the considerations that actually animated the Framers. There would have

been no reason for the Framers to build in protections for intra-session recesses because they did not exist. Until the Civil War, Congress customarily held a single session of between three and six months, followed by a long recess of six to nine months between sessions. *See* Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2210 (1994); Rappaport, *supra*, at 1498; *see generally* Floyd M. Riddick & Alan S. Furman, *Riddick's Senate Procedure: Precedents and Practice: Adjournment*, S. Doc. No. 101–28, at 14-16 (1992). Until that point, intra-session breaks were rare and lasted only for days. *See* Carrier, *supra*, at 2211. The Senate took only three brief intra-session breaks before 1857. *See id.* (explaining that in 1800, 1817, and 1828, the Senate took a five-to-seven-day intra-session break at the end of December).[8]

The government also posits a hypothetical scenario in which a vacancy arises just before the Recess, which could conceivably last longer than six months, keeping an important federal office vacant for an unacceptable length of time. *See* U.S. Br. at 33. But the hypothetical ignores that the Constitution already provides a solution. The President may "on extraordinary Occasions, convene both Houses, or either of them ... ." U.S. Const. art. II, § 3. Thus, the President can call a Special Session of the Senate to act on a nominee if timing is of the essence. Prior to the 20th Amendment, when Presidential and Congressional terms began on March 4 and Congress

8. It was not until the 20th century that Congress began regularly to schedule longer sessions, more frequent intra-session adjournments, and shorter recesses between sessions; significant departures from the traditional Senate calendar did not begin until the 1940s. *See* Carrier, *supra*, at 2239-40.

generally did not meet until the first Monday in December, Presidents called Special Sessions for this purpose no less than 42 times. *See* 4 Robert C. Byrd, Senate, 1789-1989: Historical Statistics, 1789-1992 at 452-53 (1993). As Senator Byrd explained, "[w]hen a new president was to take office, his predecessor would issue an advance call for the Senate to meet in special session at the start of the new administration's term, in order to confirm nominations to the cabinet and other significant posts and to consent to the ratification of treaties." *Id.* There is no warrant for subverting the Senate's joint role in the appointments process when the Constitution already addresses the concern.

In any event, the government's hypothetical is far less troubling than the abuses that would occur—and indeed have occurred in recent administrations—under the government's approach. Where structural principles are concerned, the Court should err on the side of formalism to prevent "a gradual concentration of the several powers in the same department." *Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting) (citation and quotation marks omitted); *see also Mistretta v. United States*, 488 U.S. 361, 382 (1989) (Scalia, J., dissenting) ("To disregard structural legitimacy is wrong itself—but since structure has purpose, the disregard also has adverse practical consequences."). The tendency is for even small inter-branch encroachments gradually to escalate to major disruptions of our skillfully constructed tripartite system. *See* The Federalist 50, at 321 (J. Madison) (Jacob E. Cooke, ed., 1961). History teaches that adherence to structural principles in the face of claims of necessity is the only surefire means of neutralizing the "'hydraulic pressure

inherent within each of the separate Branches to exceed the outer limits of it power.'" *Mistretta*, 488 U.S. at 382 (quoting *Chadha*, 462 U.S. at 951).

Finally, the government argues that the Senate has acquiesced to recess appointments during intra-session breaks, and that proves such a practice is faithful to the Clause's purpose. *See* U.S. Br. at 20. But the claim is overstated, if not entirely wrong. *See* Resp. Br. at 25-30. In 1863, for example, the Senate Judiciary Committee took the position that "the [Constitution's] language [is] too clear to admit of reasonable doubt, and that, upon principles of just construction, this period must have its inceptive point after one session has closed and before another session has begun." S. Rep. No. 80, 37th Cong., 3d Sess. (1863), at 3. The Committee also rejected Attorney General Wirt's 1823 Opinion asserting that "happen" means exist, warning that such a pliable construction of the Clause "[i]n the hands of an ambitious, corrupt, or tyrannical executive ... would soon bring about the very state of things which the Constitution so carefully guards against." *Id.* at 6.

Even accepting the government's incorrect claim that Congress has at times surrendered its advice and consent prerogative, it offers little insight into the Clause's original purpose. The Constitution's meaning does not depend on whether "the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. 144, 182 (1992). The "structural principles secured by the separation of powers protect the individual." *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011); *see also Freytag*, 501 U.S. at 880. Structural protections exist to thwart the concentration of power—not to safeguard the

parochial interests of government institutions. "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring). Congress's acquiescence makes this Court's intervention all the more essential.

III. History Shows that the Recess Appointments Clause Applies Only to Vacancies that Arise and Are Filled Between Sessions.

Given the limitations of its other arguments, the government devotes most of its attention to history. *See* U.S. Br. at 21-28, 38-44. In the government's view, the frequent intra-session appointments that have been made—particularly in recent decades—inoculate the practice against constitutional attack. But the theory violates first principles. "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 448 (1905). If a practice or custom violates the Constitution, the Court is duty bound to stop it no matter how long it has been followed by the other branches. *See Inland Waterways Corp. v. Young*, 309 U.S. 517 (1940) ("Illegality cannot attain legitimacy through practice."). In a contest between the "principle, and its later misapplications, the principle must prevail." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) (internal quotations omitted).

In any event, the history is not nearly as favorable to the government as its brief suggests. *See* Resp. Br. at 24-32. For the first 80 years following ratification, no President made an intra-session appointment. *See* Carrier, *supra*, at 2211. The first one did not occur until 1867,

when President Andrew Johnson appointed a district court judge during a three-month adjournment. *See id.* Following that, only one more intra-session appointment was made before 1947. *See id.* at 2212. In reality, the intra-session appointment is a recent invention that has appeared with regularity only in the past 50 years. *See id.*[9]

The issue, then, is not whether uniform history can trump the Constitution's text; it is whether recent practice can overcome the text *and decades of practice* following ratification. The Court resolved that issue long ago: "[A] contemporaneous construction of the Constitution since acted on with ... uniformity in a matter of much public interest and importance, is entitled to great weight, in determining whether such a law is repugnant to the Constitution." *Cooley v. Board of Wardens*, 53 U.S. 299, 315 (1851). The Court "has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution, when the founders of our government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions." *Myers v. United States*, 272 U.S. 52, 175 (1926); *see also Burrow-*

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9. The government's claim to historical pedigree with regard to "happen" is no stronger. *See* Resp. Br. at 38-48. Even accepting the government's retelling of these incidents, however, the evidence is inconclusive and therefore falls far short of what would be required to make it pertinent to the judicial inquiry—let alone powerful enough to overcome the Constitution's text. In any event, as the government acknowledges, *see* U.S. Br. at 39-42, almost all of its examples are distinguishable from the present case as they involved newly-created positions. That situation is different from the one presented here and raises the distinct issue of whether "Vacancies" refers only to existing positions or newly-created ones as well.

Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57 (1884) (Congress' copyright authority based mainly on a constitutional understanding from the First Congress that was followed for nearly a century).

In *Myers*, for example, the Court determined the scope of the President's removal power based in large part on how it was originally understood by the First Congress and then applied for the next 73 years. *See* 272 U.S. at 174-75 ("We have, first, a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the government in accord with the Constitution which had just then been adopted, and in which there were, as Representatives and Senators, a considerable number of those who had been members of the convention that framed the Constitution and presented it for ratification."). So too here. The understanding that recess appointments would be confined to breaks between sessions of Congress was endorsed by the First Congress and the Washington Administration, and it remained the view for 80 years after the Constitution's enactment. *See supra* at 28-29. This "uniform practice," 23 Op. Att'y. Gen. 599, 602-03 (1901), and settled understanding of the Recess Appointments Clause at the time of the Founding must control, even if contemporary practice deviates from the constitutional principle.

The illegitimate modern practice is more akin to the recent "political invention" of commandeering state officials to implement federal programs, which the Court struck down in *Printz*. The Court found that a nearly two-century absence of commandeering state officials to conduct federal business outweighed the recent statutes endorsing the practice. *See* 521 U.S. at 917-18. Just as in

Printz, the 80-year absence of intra-session appointments, even when it may have been in a President's interests to do so, clearly "suggests an assumed *absence* of [the] power" to make such appointments. *Id.* at 908 (citation omitted) (emphasis in original).

The government appears to suggest that recent history shows the institutional need for the President to have a unilateral means of overcoming "modern Senate practice." U.S. Br. at 19; *see also* Brennan Center Amicus Br. at 22-31. But "the original meaning of the Constitution cannot turn on modern necessity." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 532 (2009) (Thomas, J., concurring). Moreover, it is far from clear that intra-session appointments are more necessary to keep the government functioning today than in the 18th Century. *See supra* at 25-27. Early Presidents (no less than recent ones) surely would have found it convenient and useful to avoid "advice and consent" and unilaterally fill vacancies during congressional sessions. Yet no president embraced the practice during that period. *See* Resp. Br. at 36-39. In fact, several were advised that intra-session appointments violate the Constitution. *See, e.g.*, 23 Op. Att'y Gen. 599 (1901).

Furthermore, modernity only undermines many of the government's claims of necessity. Recent advances in communication and the increased speed of travel negate the asserted need for unilateral Executive appointments, as the Senate can readily reconvene to provide advice and consent on short notice. *See supra* at 25-26. It would be hard to conceive of a situation in which the President could not fill an important vacancy for a significant period of time due to his inability to reach the Senate for advice and consent. *See* Resp. Br. at 68.

Regardless, while it may at times seem efficient to avoid the constraints of "advice and consent" when Congress is in session, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Chadha*, 462 U.S. at 944. As the Court has succinctly put it, "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution[.]" *Id.* at 945. Therefore, even though the legislative veto had been included in 295 legislative provisions over 55 years, *see id.* at 944, and notwithstanding the efficiency it brought to the lawmaking process, the Court did not hesitate to strike it down as violating separation-of-powers principles of bicameralism and presentment, *see id.* at 946.

The same reasoning applies here. The recent history of intra-session appointments cannot outweigh the separation-of-powers problems the practice undoubtedly engenders no matter how customary it may now be or how convenient the President finds the ability to circumvent the Senate. "Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government" and the Court's "inquiry" should be "sharpened rather than blunted by the fact that" recess appoints "are appearing with increasing frequency...." *Id.* at 944. "The Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton*, 524 U.S. at 449 (Kennedy, J., concurring).

CONCLUSION

For all of the reasons set forth herein and all those set forth in the Respondent's brief, *amici curiae* The Atlantic Legal Foundation and The Justice Foundation respectfully request that the Court affirm the judgment of the D.C. Circuit.

Respectfully submitted,

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
STEPHEN J. OBERMEIER
WILEY REIN LLP
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
SUPREME COURT CLINIC
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000
wconsovoy@wileyrein.com

MARTIN S. KAUFMAN
ATLANTIC LEGAL FOUNDATION
2039 Palmer Avenue, #104
Larchmont, New York, 10538
(914) 834-3322

Attorneys for Amici Curiae

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NOEL CANNING, A DIVISION OF
THE NOEL CORP.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

AMICUS CURIAE BRIEF OF THE SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, JOHN BOEHNER, IN SUPPORT OF RESPONDENT

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
JORDAN A. SEKULOW
AMERICAN CENTER FOR
LAW & JUSTICE
201 Maryland Ave., NE
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

CECILIA NOLAND-HEIL
LAURA B. HERNANDEZ
AMERICAN CENTER FOR
LAW AND JUSTICE
1000 Regent University Dr.
Virginia Beach, VA
(757) 226-2489
cheil@aclj.org
lhernandez@aclj.org

Attorneys for Amicus Curiae

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INTEREST OF AMICUS*

Amicus Curiae, John Boehner, is the Speaker of the United States House of Representatives. As Speaker of the House, he represents the House of Representatives' interest in upholding the Constitution. The Speaker has a unique constitutional role in protecting the House's institutional prerogative in setting legislative recesses and adjournments. The President's determination that Congress was in recess on January 4, 2012, was in error and violated the separation of powers because it tread upon Congress's authority under Article I, § 5, cl. 2 ("the Rulemaking Clause") to determine its own rules of meeting. Executive interference with the House of Representatives' powers under the Rulemaking Clause threatens the House's ability to function independently as an integral part of the Legislative Branch of government, and it is therefore Amicus' duty to resist such interference.

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*Blanket consents to the filing of amicus briefs have been filed by Petitioner and Respondents. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Framers of Constitution intended each of the three branches of government to resist the abuse of power by any one of them. The President's decision to overrule Congress's determination that it was in session on January 4, 2012 is such an abuse of power and the Speaker of the House, on behalf of the House of Representatives, has a constitutional duty to oppose the President's trespass on the Legislative Branch's domain.

The power to set the times of its meetings and adjournments is reserved, with minor exception, to the Senate and the House of Representatives. For purposes of the recess appointments clause, a recess occurs only when the Senate and House agree to pass concurrent resolutions that they are in recess. No such resolutions were passed, and Congress was therefore in session on January 4, 2012.

The President's usurpation of Congress's authority to establish when it is in session threatens the constitutional boundaries of the pocket veto. If the President can unilaterally declare when Congress is in recess, he can also deprive Congress of its constitutional authority over pocket vetoes.

ARGUMENT

I. Under the Separation of Powers Doctrine, the Executive and Legislative Branches of Government Are Co-Equal and the President Has No Authority to Overrule Congress's Determination that It Is in Session.

The stability of our Constitutional government rests in large part on the doctrine of the separation of powers. The Constitutional Convention of 1787 adopted the doctrine "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

The Framers' rationale for the separation of powers derived from their observations of human nature and its tendency to accrete power. James Madison wrote:

> This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

Federalist No. 51, at 323-24 (James Madison) (G.P. Putnam's Sons ed. 1908).

The British crown's abuses demonstrated the evils of power concentrated in one sovereign and fueled the Framers' desire to depart from the British model. In the Declaration of Independence, one of the Colonists' grievances was that the King had "called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures." Thus, although the King had expansive authority to "prorogue or even dissolve the Parliament," the Constitution grants the President very limited power to adjourn Congress "only in the single case of

disagreement about the time of adjournment." [1] Federalist No. 69 (Alexander Hamilton) (G.P Putnam's Sons ed. 1908); *Barnes v. Kline*, 759 F.2d 21, 31 n.20 (D.C. Cir. 1984) ("The *only exception* to Congress's control over its own adjournments is in case of a disagreement between the two houses 'with Respect to the Time of Adjournment,' in which case the President 'may adjourn them to such Time as he shall think proper.'" (emphasis added) (quoting U.S. Const. art. II, § 3)) *vacated on other grounds by Burke v. Barnes*, 479 U.S. 361 (1987).

The tripartite government the Framers designed granted largely co-equal powers between the Executive and Legislative Branches. And as Thomas Jefferson wrote, "[e]ach house of Congress possesses th[e] natural right of governing itself, and consequently of fixing its own times and places of meeting, so far as it has not been abridged by . . . the Constitution."[2] Through the Rulemaking Clause, the Framers delegated to each House of Congress the

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[1] Article II, Section 3 of the Constitution states that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, *and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper*." U.S. Const. art. II, § 3 (emphasis added).

[2] Thomas Jefferson, Opinion on the Constitutionality of the Residence Bill of 1790 (July 15, 1790), *available at* http://press-pubs.uchicago.edu/founders/ print_documents/a1_5s14.html.

authority to "determine the Rules of its Proceedings."[3]

Congress's interpretation of its own rules is "beyond the challenge of any other body," including the President. *United States v. Ballin*, 144 U.S. 1, 5 (1892) (concluding that the Court must give great weight to the Legislative Branch's construction of its own rules and the power to determine its own rules is "continuous."). "The respect due to a co-ordinate branch of government," *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892), requires the President to defer to Congress's determination of when it is in session. Here, the President did not defer to Congress's interpretation of its own rules; he substituted his own views, declaring by executive *ipse dixit* that Congress was not in session. The President's disregard of Congress's determination that it was in session on January 4, 2012 assails the Framers' design.

A. As Speaker of the House, it is Amicus's Constitutional Responsibility to Protect the House of Representatives' Institutional Prerogative Under the Rulemaking Clause to Determine When it is in Session.

Essential to the separation of powers is each branch of government's vigilance against

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[3] U.S. Const. art. I, § 5, cl. 2.

encroachment by the other branches. James Madison wrote:

> the great security against a gradual concentration of the several powers in the same [branch of government], consists in giving to those who administer each [branch] *the necessary constitutional means* and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.

The Federalist No. 51, at 323-324 (James Madison) (G.P. Putnam's Sons ed., 1908).

Addressing executive encroachment upon the Legislative Branch's powers, this Court observed that the "Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). Although the Constitution divides power over government appointments between the Senate and the President, the structural interests protected by the Appointments clause belong to the entire Republic. *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991). Thus, as the House's sole elected leader, Amicus has the constitutional responsibility to resist

the President's encroachment on the Legislative Branch's exclusive authority to determine when it is in recess.

B. For Purposes of the President's Recess Appointment Power, a Recess Exists Only When the House and Senate Agree That the Senate is in Recess.

Amicus agrees with the court of appeals' holding that the term "the Recess" in the Recess Appointments Clause is properly construed to mean only inter-session recesses, and not intra-session recesses. *Canning v. NLRB*, 705 F.3d 490, 506 (D.C. Cir. 2013). Should this Court determine, however, that intra-session recesses are included within the scope of the Recess Appointments Clause, in keeping with current House rules [4] governing recess and adjournment, the President's recess appointments on January 4, 2012 are still invalid.

As the current Administration argued to this Court, intra-session recess appointments are only permissible when Congress is in recess for a period of more than three days. Transcript of Oral Argument at 50, *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010) (08-1457).[5] The Office of Legal Counsel has consistently advised the Executive Branch to wait for

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[4] *See* House of Representatives Rule 1, Cl. 12(c).

[5] *Available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1457.pdf.

a recess of at least 10 days before making a recess appointment. *See, e.g.*, *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 21-22, 25 (1921) ("Daugherty Opinion") (a recess of "even 10 days" cannot constitute the recess intended by Recess Appointments Clause); Memorandum from Jack L. Goldsmith to Alberto Gonzalez, *Re: Recess Appointments in the Current Recess of the Senate*, at 3 (Feb. 20, 2004); *Recess Appointments—Compensation (5 U.S.C. § 5503)*, 3 Op. O.L.C. 314, 316 (1979); *Recess Appointments*, 41 Op. Att'y Gen. 463, 468 (1960).

A recess of more than three days requires the consent of both the House and the Senate. "Neither House, during the Session of Congress, shall, without Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting." U.S. Const. art. I, § 5, cl. 4. "There are: (1) adjournments of three days or less, which are taken pursuant to motion; . . . (2) adjournments of more than three days, which require the consent of the Senate; . . . and (3) adjournments sine die, which end each session of a Congress and require the consent of both Houses."[6]

When the House and the Senate decide to adjourn for more than three days, each body will adopt a

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[6] John V. Sullivan, U.S. House of Representatives, 112th Cong., *House Practice: A Guide to the Rules, Precedents, and Procedures of the House* 2 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-112/pdf/GPO-HPRACTICE-112.pdf.

concurrent resolution allowing either or both bodies to recess for longer than three days. Here, neither the House nor the Senate adopted a concurrent resolution allowing either to adjourn for more than three days during this period. Accordingly, because the House and the Senate did not agree to recess, the President had no basis to claim that the Senate was in an intra-session recess. He therefore lacked any power to make recess appointments during this period, including on January 4, 2012, when he made the appointments in question.

As the Court of Appeals held, "[a]llowing the President to define the scope of his own appointments power would eviscerate the Constitution's separation of powers." 705 F.3d at 504.

II. The Executive's Unconstitutional Assertion of Authority Over Legislative Recesses Threatens the Constitutional Boundaries of the Pocket Veto.

Upholding the President's unconstitutional attempt to declare when Congress is in session would invite a similar effort to usurp Congress's authority over pocket vetoes. Because pocket vetoes are triggered by Congress's decision to adjourn, the President could claim a pocket veto of disfavored legislation with a declaration that Congress has adjourned.

The Constitution provides that any bill not returned by the President "within ten Days (Sundays

excepted)" shall become law "unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."[7] The Framers carefully circumscribed the veto power of the Executive Branch and rejected proposals by James Wilson and Alexander Hamilton for an absolute executive veto.[8]

A pocket veto is subject to Congress's constitutional authority, made possible when Congress waives its right to reconsider legislation by adjourning before the President returns the bill. H. Rept. No. 93-1021, 93rd Cong., 2nd sess. 2 (1974). In *Wright v. United States*, 302 U.S. 583, 596 (1938), the Court held that an intra-session adjournment of Congress did not prevent the President from returning a bill he disapproved, as long as appropriate arrangements are made by the originating House for the receipt of Presidential messages during the adjournment. The validity of a pocket veto is governed not by the type or length of adjournment but by whether the conditions of the adjournment impede the actual return of the bill. *Barnes v. Kline*, 759 F.2d 21, 30 (D.C. Cir 1985).[9]

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[7] U.S. Const. art. I, § 7.

[8] 1 The Records of the Federal Convention of 1787, 96-104 (Max Farrand ed., New Haven, Conn.: Yale University Press, 1937), *available at* http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=1057&Itemid=27.

[9] *See also* House Practice, *supra* note 6, at 917.

The President has attempted to circumvent the rules governing pocket vetoes. On December 30, 2009, the President claimed that he "pocket vetoed" House Joint Resolution 64 (hereinafter "H.J. Res. 64"), a short-term continuing resolution of appropriations that was presented to him on December 19, 2009. The President acted on the joint resolution on the ninth day of the ten-day period during which he could approve it. Citing *The Pocket Veto Case*, 279 U.S. 655 (1929), he returned it to the House with a memorandum of disapproval stating that he wanted to leave no doubt that the joint resolution was being vetoed as unnecessary.[10]

At that point, the House and Senate were "adjourned sine die but with provision for reassembly of the first session and with the certainty of reassembly for the second session. Thus, each body was in a position to reconsider the vetoed measure in light of the President's objections, either in the first or the second session."[11] House rules made the Clerk available to receive his message, and in fact the Clerk did receive his message.[12]

The President's attempt to force a pocket veto of H.J. Res. 64 was unconstitutional. As explained in a

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[10] 156 Cong. Rec. E941 (daily ed. May 26, 2010) (Extension of Remarks, Pocket Veto Power, Letter from Speaker Pelosi and Republican Leader Boehner to President Obama).

[11] *Id.*

[12] *Id.*

letter from Speaker of the House Nancy Pelosi and Republican Leader John Boehner to the President, the President's return of H.J. Res. 64 with objections "was inconsistent with the most essential characteristic of a pocket veto, to wit: retention of the parchment by the President for lack of a legislative body to whom he might return it with his objections."[13] The President's successful return of H.J. Res. 64 proved that he was not prevented from returning it. "[T]he Constitutional concern that a measure not become law without the President's signature when an adjournment prevents a return veto does not arise when the President is able to return the parchment to the originating House with a statement of his objections."[14]

Other Presidents have also asserted pocket veto authority by employing what is known as a "protective return" veto, whereby a bill is not signed, but returned to Congress with a "memorandum of disapproval."[15] "In such instances, the House has regarded the President's actual return of the bill without a signature as a return veto and proceeded

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[13] *Id.*

[14] *Id.* On January 13, 2010, the House reconsidered the joint resolution in light of the President's objections and voted by the yeas and nays on the question of overriding or sustaining the veto. The House sustained the President's return veto. *Id.*

[15] House Practice, *supra* note 6, at 917.

to reconsider the bill over the President's objections."[16]

In conclusion, the President's valid exercise of pocket veto authority is contingent on Congress's decision when to adjourn, and the President possesses no independent pocket veto power. To allow the President to decide the conditions for Congressional adjournment would expand the pocket veto to a kind of absolute veto that the Framers rejected.

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[16] *Id.* For a joint letter from Speaker Foley and Minority Leader Michel to the President, and a response thereto by Attorney General Thornburg, on the use of pocket veto authority during an intra-session adjournment, see 101st Cong. Rec. H3 (daily ed. Jan. 23, 1990). For joint letters from Speakers and Minority Leaders reiterating their predecessors' concerns in this area, see 106th Cong. Rec. 18594 (2000); 106th Cong. Rec. 26023 (2000); 110th Cong. Rec. E2197-98 (daily ed. Oct. 2, 2008); and 111th Cong. Rec. E914-15 (daily ed. May 26, 2010).

For discussions of the constitutionality of inter-session or intra-session pocket vetoes, see Edward M. Kennedy, *Congress, The President, and The Pocket Veto*, 63 Va. L. Rev. 355 (1977); Robert J. Spitzer, *The 'Protective Return' Pocket Veto: President Aggrandizement of Constitutional Power*, 31 Presidential Stud. Q. 720 (2001); and *Hearings on H.R. 849 Before the Subcomm. on the Legislative Process of the House Comm. on Rules*, 101st Cong. 140-42 (1989).

CONCLUSION

For the foregoing reasons, Amicus urges this Court to affirm the judgment below.

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
COLBY M. MAY
JORDAN A. SEKULOW
AMERICAN CENTER FOR
LAW & JUSTICE
201 Maryland Ave., NE
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

CECILIA NOLAND-HEIL
LAURA HERNANDEZ
AMERICAN CENTER FOR
LAW AND JUSTICE
1000 Regent University Dr.
Virginia Beach, VA
(757) 226-2489

November 25, 2013 *Counsel for Amicus*

AMICUS CURIAE BRIEF

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Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., ET AL.,

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE THE BRENNAN CENTER FOR JUSTICE IN SUPPORT OF PETITIONER AND REVERSAL

BURT NEUBORNE
40 Washington Square South
New York, NY 10012
(212) 998-6172

WENDY WEISER
DIANA KASDAN
ALICIA BANNON
THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(646) 292-8310

SIDNEY S. ROSDEITCHER
Counsel of Record
JACOB H. HUPART
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
srosdeitcher@paulweiss.com

Counsel for Amicus Curiae

September 20, 2013

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INTEREST OF AMICUS[1]

The Brennan Center for Justice at N.Y.U. School of Law (the "Brennan Center") is a not-for-profit, non-partisan public policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality by working to eliminate government dysfunction and gridlock and to preserve the constitutionally-mandated separation of powers among the branches of government. It has played a leading role in advocating for a more effective U.S. Congress by seeking to curb abuses of the filibuster rule in the Senate, including publishing two reports on the subject and submitting written and oral testimony to the Senate on the historical and modern use of the filibuster.[2]

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[1] This brief *amicus curiae* is filed with the consent of all parties. Counsel for the Brennan Center affirm, pursuant to Supreme Court Rule 37.6, that no counsel for any party authored this brief in whole or in part, and that no party, counsel for any party, or any other person other than *Amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

[2] *See* Mimi Marziani et al., The Brennan Center, *Curbing Filibuster Abuse* (2012), *available at* http://www.brennancenter.org/sites/default/files/legacy/publications/Curbing_Filibuster_Abuse.pdf; Mimi Marziani, The Brennan Center, *Filibuster Abuse* (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Filibuster%20Abuse_Online%20Version.pdf; *Examining the Filibuster: Legislative Proposals to Change*

The Brennan Center respectfully submits this brief *amicus curiae* in support of the National Labor Relations Board as Petitioner, urging reversal of the Court of Appeals' judgment below. The Brennan Center also supports Petitioner's argument that the stratagem of holding *pro forma* sessions cannot extinguish the President's express constitutional authority to make recess appointments when in fact the Senate is simultaneously unavailable to provide advice and consent. The Brennan Center is concerned that the unduly restrictive interpretation of Article II, section 2, clause 3 ("the Recess Appointments Clause") propounded by the Court of Appeals below, together with the Senate's

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Senate Procedure Before the Sen. Comm. on Rules & Admin., 112th Cong. (2012) (statement of Mimi Marziani, The Brennan Center), *available at* http://www.brennancenter.org/analysis/testimony-mimi-marziani-filibuster-legislative-proposals-change-senate-procedure; *Examining the Filibuster: Silent Filibusters, Holds and the Senate Confirmation Process Before the Sen. Comm. on Rules & Admin.*, 111th Cong. (2010) (statement of Mimi Marziani & Diana Lee, The Brennan Center), *available at* http://www.brennancenter.org/analysis/testimony-mimi-marziani-and-diana-lee-examining-filibuster; *The Filibuster Today and Its Consequences Before the Sen. Comm. on Rules & Admin.*, 111th Cong. (2010) (statement of The Brennan Center), *available at* http://www.brennancenter.org/analysis/testimony-senate-rules-committee-modern-filibuster; *Examining the Filibuster: History of the Filibuster 1789-2008 Before the Sen. Comm. on Rules & Admin.*, 111th Cong. (2010) (statement of Mimi Marziani & Diana Lee, The Brennan Center), *available at* http://www.brennancenter.org/analysis/testimony-filibuster-reform-submitted-senate-committee-rules-and-administration; *see also* Alicia Bannon, The Brennan Center, *Federal Judicial Vacancies: The Trial Courts* (2013), *available at* http://www.brennancenter.org/sites/default/files/publications/Judicial%20Vacancies%20Report%20Final.pdf.

unprecedented adoption of *pro forma* sessions to eliminate recesses, threaten to subvert the carefully-calibrated balance of powers between the President and the Senate mandated by the Constitution.

SUMMARY OF ARGUMENT

This Court has emphasized that "one of [its] most vital functions . . . is [to] police with care the separation of the governing powers." *Public Citizen* v. *United States Dept. of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring). The Court has therefore consistently intervened to prevent one branch from aggrandizing its powers at the expense of the other two. In this brief, amicus shows that the D.C. Circuit's unduly narrow interpretation of the Recess Appointments Clause, and allowing the Senate's adoption of illusory *pro forma* sessions to eliminate recesses, would facilitate and encourage serious infringements on the separation of powers. It would eliminate the check that the Recess Appointments Clause has long been understood to impose against obstructive tactics that would aggrandize the Senate's advice and consent power at the expense of the President. Here, elimination of that check would have empowered a Senate minority, through an abuse of the filibuster rule, to deny the President any means of appointing officers needed to assist him in carrying out his executive functions under Article II of the Constitution, including the duty "to take care that the laws be faithfully executed." U.S. Const. art. II, § 3.

The Founders designed the appointments power as a carefully balanced mechanism to assure

the timely appointment of qualified officers needed to assist the President in carrying out his executive functions. To that end, in the Appointments Clause, the Founders conferred on the President the power to nominate, and subject to the Senate's advice and consent, to appoint senior government officers, judges, and other officials. U.S. Const. art. II, § 2, cl. 2. As a failsafe device to assure that such appointments are timely made when the Senate is unavailable to perform its advice and consent function, the Recess Appointments Clause was added to give the President the unilateral power to make temporary appointments to fill vacancies. U.S. Const. art. II, § 2, cl. 3.

For almost two centuries, the appointments process worked almost as smoothly as the Founders expected. The President's appointments were rarely overruled by the Senate, and as Senate recess practices evolved, Presidential and Senate practice interpreted the Recess Appointments Clause in the manner best suited to carry out its purpose to assure that vacancies were timely filled when the Senate was unavailable to offer advice and consent. As so interpreted, the Recess Appointments Clause has operated as a check against the natural temptation of the Senate to seek to aggrandize its advice and consent power by converting it into a license to obstruct democratically-elected Presidents from governing.

The D.C. Circuit's restrictive interpretation of the Recess Appointments Clause and the Senate's adoption of *pro forma* sessions to eliminate recesses would eviscerate that check, and do so at a time

when it is most needed. In recent decades, the delicate balance struck by the Founders has been undermined by extreme partisan tactics that the Founders never anticipated. Senate majorities of both parties have sought to thwart the President's nominations by simply refusing to submit them to the advice and consent process. Most significantly here, changes to the Senate filibuster rules in the 1970s facilitated and greatly increased the use of the filibuster by both Democratic and Republican Senate minorities as an obstructionist device to prevent the operation of the advice and consent process and deny or delay submission of the President's nominees for confirmation by the Senate.

In this partisan atmosphere, Presidents of both parties increasingly have been forced to resort to the recess appointment power as a check on these obstructive tactics. In this case, for example, the Senate minority used the filibuster rule to block the President's nominees to the NLRB from receiving a Senate confirmation vote for more than three years. If the President had not exercised the recess appointment power to appoint sufficient members to the NLRB to achieve the required quorum, the Senate minority would have wholly paralyzed the operations of the NLRB from 2010 to 2013.

In his classic exposition of separation of powers, James Madison emphasized that:

> [T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each

> department the necessary constitutional means and personal motives to resist encroachments of the others.

The Federalist No. 51, at 349 (James Madison) (Jacob Cooke ed., 1961). The D.C. Circuit's narrow reading of the Recess Appointments Clause and the Senate's adoption of *pro forma* sessions to eliminate recesses would deprive Presidents of the constitutional means of resisting encroachment on the executive power, conferred by Article II, to appoint executive officers, a power "confirmed by his obligation to take care that the laws be faithfully executed." *Myers* v. *United States*, 272 U.S. 52, 163-64 (1926). This Court should reject such a subversion of the separation of powers and the constitutional design.

ARGUMENT

I. THE COURT SHOULD ADOPT AN INTERPRETATION OF THE RECESS APPOINTMENTS CLAUSE THAT RESPECTS ITS STRUCTURAL ROLE IN THE APPOINTMENTS PROCESS AS A WHOLE, AND THAT AVOIDS AGGRANDIZING THE POWER OF THE SENATE OR A SENATE MINORITY

This case presents a question that is among the most delicate and important of any this Court is called upon to decide: mapping the relative contours of important powers shared by the co-equal political branches, and preserving the constitutionally-mandated separation of powers between the

Executive and Legislative branches. As Justice Kennedy has explained:

> The Framers of our Government knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers . . . It remains one of the most vital functions of this Court to police with care the separation of the governing powers. That is so even when . . . no immediate threat to liberty is apparent.

Public Citizen v. *United States Dept. of Justice*, 491 U.S. at 468 (1989) (Kennedy, J., concurring).

In performing this function, the Court has eschewed formalistic categories or artificially rigid approaches to constitutional text. Instead, the Court has adopted a practical approach in its separation of powers decisions, emphasizing that:

> The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively . . . .

Buckley v. *Valeo*, 424 U.S. 1, 121 (1976).

Accordingly, this Court interprets the often ambiguous provisions of the Constitution that define and implement the separation of powers pragmatically, seeking to preserve the essential design of the Constitution without imposing unworkable limitations on the ability to govern. As Justice Jackson explained in his *Youngstown* concurrence:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but inter-dependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Moreover, in resolving separation-of-powers disputes, the Court has been particularly alert to efforts by one branch to aggrandize its powers at the expense of another. *See Morrison* v. *Olson*, 487 U.S. 654, 675-76 (1988) ("[S]eparation-of-powers concerns

. . . would arise if such provisions for appointment had the potential to impair the constitutional functions assigned to one of the branches . . . ."); *Freytag* v. *C.I.R.*, 501 U.S. 868, 878 (1991) ("[This Court's] separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch." (citing *Mistretta* v. *United States*, 488 U.S. 361, 382 (1989)).

The Court has been especially concerned with the tendency of the legislative branch to aggrandize its power at the expense of the other two branches. *See Buckley* v. *Valeo*, 424 U.S. at 129 ("[T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches."); *Edmond* v. *United States*, 520 U.S. 651, 659 (1997) ("[T]he Appointments Clause prevents Congressional encroachment upon the Executive and Judicial Branches."); *see also INS* v. *Chadha*, 462 U.S. 919 (1983) (holding that Congress cannot grant itself a legislative veto over executive branch actions); *Bowsher* v. *Synar*, 478 U.S. 714 (1986) (holding that provisions in the Balanced Budget and Emergency Deficit Control Act violated the Constitution's command that Congress play no direct role in the execution of the laws).

The text of the provision at issue—the Recess Appointments Clause—can be plausibly read to encompass either of the contending interpretations offered by the government and respondent, as the

conflicting readings of the lower courts demonstrate.[3] In these circumstances, in particular, the choice between two plausible readings of the Recess Appointments Clause should be governed by which interpretation of the clause best promotes, and does least violence to, the allocation of power between the President and the Senate that the Founders originally envisioned, and which reading best promotes the workable government they sought to achieve.

In the pages that follow, amicus shows that the D.C. Circuit's overly-narrow reading of the Recess Appointments Clause would upset the carefully-calibrated balance of powers established by the Constitution's appointments mechanism, by eliminating a crucial structural check on obstructive

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[3] *Compare Noel Canning* v. *N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013) *with Evans* v. *Stephens*, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005); *United States* v. *Allocco*, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963); *United States* v. *Woodley*, 751 F.2d 1008 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986). In the recent Third Circuit decision agreeing with the D.C. Circuit's interpretation of "the recess," the majority nonetheless acknowledges that either interpretation would fit within a natural reading of the text and dictionaries contemporaneous with the Founding, *N.L.R.B.* v. *New Vista Nursing & Rehab.*, 719 F.3d 203, 221 (3d Cir. 2013), while the dissent held that "the recess" encompassed *intrasession* recesses. *Id.* at 270 (Greenway, J., dissenting) ("The inclusion of intrasession recesses in the ambit of the Recess Appointments Clause is the interpretation most faithful to the text of the Constitution, the intent of the Framers, the purpose of recess appointments, and the tradition and practice of both the President and the Senate."). *See also N.L.R.B.* v. *Enter. Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013), and the conflicting interpretation of the majority and the dissent there.

tactics designed to aggrandize the Senate's advice and consent power at the expense of the powers allocated to the President, subverting the President's capacity "to take care that the laws be faithfully executed." Amicus shows, as well, that the Senate's adoption of illusory *pro forma* sessions to eliminate formal recesses, in order to deprive the President of his recess appointment power entirely, would have the same unconstitutional effect.

II. THE CONSTITUTION'S APPOINTMENTS PROVISIONS ESTABLISH A CAREFULLY BALANCED MECHANISM TO EFFICIENTLY AND TIMELY FILL THE OFFICES NEEDED TO ASSIST THE PRESIDENT IN EXECUTING THE LAWS

The Constitution's appointments mechanism has as its objective the appointment by the President of qualified officials needed to assist the President in fulfilling his obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. As this Court has emphasized:

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should

> select those who were to act for him under his direction in the execution of the laws. . . . Our conclusion . . . is that article 2 grants to the President the executive power of the government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed. . . .

Myers v. *United States*, 272 U.S. at 117, 163-64. *Accord Buckley v. Valeo*, 424 U.S. at 135-36. The same principle was cogently put by President Polk's Attorney General long ago:

> The constitution . . . requires that the President shall take care that the laws be faithfully executed. In the performance of public executive duties, it is important that officers filling the offices authorized by law shall be appointed. Offices without officers are useless to the public; and the constitution may fairly receive such a construction as will accomplish its ends without doing violence to its terms.

Powers of the President to Fill Offices During the Recess of the Senate, 4 Op. Att'y Gen. 523, 525-26 (1846) (AG Mason).

The Founders carefully designed the appointments power as a mechanism to achieve that

objective of filling the offices authorized by law.[4] Article II, § 2, cl. 2 provides the President with the initial authority to nominate principal officers of the United States, and with the advice and consent of the Senate, ultimately to appoint officials, because as Alexander Hamilton explained:

> [O]ne man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment. . . . A single well-directed man, by a single understanding, cannot be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body.

The Federalist No. 76, at 510-11 (Alexander Hamilton) (Jacob Cooke ed., 1961). This choice also reflected the Founders' belief that a single individual would be more accountable and therefore more reliable. As Hamilton further explained:

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[4] The appointments mechanism laid out in the Constitution provides, in relevant part: "The President . . . shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . . The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of their next Session." U.S. Const. art II, § 2, cl. 2-3.

> The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.

Id.; *see also Public Citizen*, 491 U.S. at 483 n.4 (Kennedy, J., concurring) (citing Federalist No. 76).

The President's power to appoint is, nevertheless, made subject to the Senate's "advice and consent," to provide a check on any "spirit of favoritism" that might result in the appointment of unfit persons. The Federalist No. 76, at 513 (Alexander Hamilton) (Jacob Cooke ed., 1961). The Founders, however, thought it "not very probable that [the President's] nomination would often be overruled. . . . where there were not special and strong reasons for the refusal" because the Senate could not be "certain that a future nomination [by the President] would present a candidate in any degree more acceptable to them . . . ." *Id.* at 512-13. Rather, the Founders believed:

> [T]he necessity of [the Senate's] concurrence would have a powerful, though, in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the

> appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

Id. at 513.

Finally, as a fail-safe mechanism to assure that important vacancies are promptly filled when the Senate is unavailable to perform its advice and consent function, Article II, § 2, cl. 3 provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the end of their next Session." As Hamilton explained:

> The relation in which [the Recess Appointments Clause] stands to the [Appointments Clause], which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other, for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.

The Federalist No. 67, at 455 (Alexander Hamilton) (Jacob Cooke ed., 1961).

In the years that followed ratification, the Recess Appointments Clause was interpreted in a pragmatic fashion to carry out the Founders' desire to assure that important vacancies were timely filled. After some controversy in the years immediately

following ratification about whether a vacancy occurring during a Senate session but continuing into the recess was a vacancy that "happens during the recess," it soon became evident that reading the Recess Appointments Clause as excluding such vacancies from the recess appointment power would undermine the purpose of the Constitution, which was to assure the continuous presence of important officials, temporarily appointed if necessary, needed to execute the laws.[5] Thus, in 1823, Attorney General Wirt advised President Monroe that a vacancy that "happens" during the recess could plausibly be read to mean "happens to exist" during the recess, and that such vacancies could be temporarily "filled up" during the Senate's recess. As Attorney General Wirt reasoned:

> The substantial purpose of the constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed. But if the President shall not have the power to fill a vacancy [first arising during the Senate session but not confirmed before it recessed], the powers are inadequate to the purpose, and the substance of the constitution will be sacrificed to a dubious construction of its letter. . . . [I]f we interpret the word "happen" as . . . equivalent to "happen to exist," (as I think we may legitimately do) . . . the

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[5] *See* Brief of Petitioner, *National Labor Relations Board* v. *Noel Canning*, No. 12-281 (2013) ("Pet. Br."), at 28-44.

> whole purpose of the constitution is completely accomplished.

Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631, 632-33 (1823) (AG Wirt). President Monroe's adoption of this common sense construction, and the principle it embodies, has been consistently applied by Presidents,[6] and endorsed by the courts for almost two centuries until this case.[7]

Thus, in the 20th century, when advances in transportation technologies permitted the Senate to take frequent and substantial *intrasession* recesses,[8] President Harding's Attorney General applied the same principle of common sense construction to the meaning of "recess." He concluded that the term included substantial *intrasession* recesses, as well as the *intersession* recess occurring between sessions of

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[6] *See* Pet. Br. at 21-28.

[7] *See Evans* v. *Stephens*, 387 F.3d at 1226-27; *United States* v. *Woodley*, 751 F.2d at 1012-13; *United States* v. *Allocco*, 305 F.2d at 712-13, *but see Noel Canning* v. *N.L.R.B.*, 705 F.3d at 512; *N.L.R.B.* v. *Enter. Leasing Co. Southeast, LLC*, 722 F.3d at 676; *N.L.R.B.* v. *New Vista Nursing & Rehab.*, 719 F.3d at 244.

[8] Given the realities of travel in the early years of the republic, *intrasession* recesses were rare and brief; there were only 11 such recesses prior to 1867, none lasting more than two weeks. Between 1867 and 1941 there were 64 such recesses, with one lasting 130 days. *See* Thomas Glavin, *Constitutional Law-Congressional Standing and the Pocket Veto During Intersession Adjournments*, 59 Temple L.Q. 151 app. (1986). *See also* Pet. Br. at 21-28. The fact that early recess practices were limited by travel realities to *intersession* recesses should no more determine the meaning of "recess" than the fact that at the time of adoption of the Second Amendment, "arms" were understood to mean muskets. *See District of Columbia* v. *Heller*, 554 U.S. 570, 622 (2008) (Scalia, J.).

Congress. He ruled, therefore, that the Recess Appointments Clause could be employed whenever "the Senate [was] absent so that it [could] not receive communications from the President or participate as a body in making appointments." Executive Power-Recess Appointments, 33 U.S. Op. Att'y Gen. 20, 21-22, 25 (1921). Prior to the D.C. Circuit's decision, that reading had been applied for almost a century.[9]

The common sense reading of the text of the Recess Appointments Clause adopted by President Monroe in 1823, and by President Harding a century later, has enabled the clause to operate for almost two centuries as a crucial structural check against Senate failure or refusal to perform its advice and consent responsibilities during its regular sessions. Until now, Senators tempted to aggrandize the advice and consent power in an effort to prevent a President from governing were on notice that if they prevented the Senate from voting on Presidential nominations, the President would eventually be empowered to "fill up" the vacancy with a temporary recess appointment. Moreover, when *intrasession* recesses of considerable duration became feasible and more common, the word "recess" was read to include both *intra-* and *inter-session* recesses, so the Senate could not deprive the President of his recess appointment power by reducing or eliminating *intersession* recesses in favor of *intrasession* recesses. Under the common sense reading of the word, if a Senate recess was of sufficient duration to render the Senate unable to perform its advice and consent function, the President remained able to fill

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[9] *See* Pet. Br. at 24-28.

vacancies during that recess regardless of whether it was an *intersession* or *intrasession* recess.

As amicus now shows, the unduly narrow interpretation of the recess appointment power espoused by the court below, and the recent unprecedented use by the Senate of *pro forma* sessions to eliminate recesses, would effectively remove the Recess Appointments Clause as a structural check on Senate aggrandizement of the advice and consent power, at a time when it is most needed to counter extreme partisan obstructionism by both parties.

III. THE D.C. CIRCUIT'S INTERPRETATION OF THE RECESS APPOINTMENTS CLAUSE AND THE SENATE'S USE OF *PRO FORMA* SESSIONS WOULD UNDERMINE SEPARATION OF POWERS BY REMOVING THE PRINCIPAL STRUCTURAL CHECK ON SENATE OBSTRUCTION AT A TIME WHEN THAT CHECK IS MOST NEEDED

The unduly narrow interpretation of the recess appointment power espoused by the court below, and the Senate's use of *pro forma* sessions to eliminate recesses, would eviscerate the Recess Appointments Clause as a structural check on partisan obstructionism. This would invite the full Senate, when controlled by a party opposed to the President, or a Senate minority armed with the filibuster rule, to distort the advice and consent power into an engine designed to prevent the President from appointing officers of his choosing.

Eliminating the structural check provided by a viable Recess Appointments Clause would, moreover, be particularly destructive at this time, given the extreme and unprecedented level of partisan obstruction that currently prevails and the ease with which extreme partisans can hijack the Senate under the modern filibuster rule.

A. The D.C. Circuit's Interpretation of the Recess Appointments Clause and the Senate's Use of *Pro Forma* Sessions Would Remove Checks on the Senate and Would Subvert the Separation of Powers

By limiting the power to fill vacancies to those arising during a recess, the D.C. Circuit would empower the Senate to refuse to act on nominations during its regular sessions, knowing that vacancies could not be filled temporarily by the President during a Senate recess. And, by limiting the recess appointment power to *intersession* recesses, the D.C. Circuit's interpretation would enable the Senate to manipulate recesses to eliminate *intersession* recesses, or to limit their duration to a metaphysical instant between two sessions, while expanding the number and duration of *intrasession* recesses, thus preventing the President from filling vacancies even though the Senate is unavailable to exercise its advice and consent function. In fact, in this very case, the D.C. Circuit found that there was no

intersession recess before the session of Congress that began on January 3, 2012.[10]

Allowing the *pro forma* sessions to prevent the exercise of the recess appointment power, even though the Senate is in fact unavailable to provide advice and consent, would have a similar destructive effect on the role of the Recess Appointments Clause as a structural check on unconstitutional efforts to abuse the advice and consent power. *Pro forma* Senate sessions permit the Senate to take what are in fact extended recesses in any common-sense understanding of the term, free from the check of the recess appointment power. Indeed, they would enable the Senate to eliminate the recess appointment power altogether.

Under any of these scenarios, the President could be deprived of any ability to fill crucial vacancies in the face of the Senate's, or a Senate minority's, obstruction of the regular method of appointment through advice and consent. The Senate minority would be able to engage in these obstructive tactics without any check and oblige the President to either leave vacancies unfilled or accept conditions that the Senate minority sought to extort. Such an aggrandizement of the powers of the Senate or a Senate minority at the expense of the President would severely distort the balance of powers which the Founders established in designing the Constitution's appointments mechanism.

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[10] *Noel Canning* v. *N.L.R.B.*, 705 F.3d at 512 ("First, the vacancy could not have arisen during an intersession recess because the Senate did not take an intersession recess between the first and second sessions of the 112th Congress.").

B. The Elimination of the Checks Provided By the Recess Appointments Clause Would Be Especially Damaging Now

The elimination of the checks heretofore imposed by the Recess Appointments Clause would come at a time of extreme partisanship that first began in the late 1970s and is now at fever pitch, when the use of such obstructive tactics, in particular the filibuster, have increased to an unprecedented degree and already have caused severe government dysfunction.[11]

Most significantly for this case is the recent unprecedented use of the filibuster rule by a Senate minority to prevent the President from appointing officials to assist him in executing duly enacted laws through the regular appointments process of advice and consent.

The filibuster was originally designed as a means to promote debate in the Senate, but it has since been effectively transformed into a minority veto that imposes few if any costs on those invoking it. Earlier versions of the filibuster imposed the burden on those seeking to maintain it to speak without interruption, maintain a substantial attendance in the Senate, and be held publicly accountable for those delays. The current filibuster

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[11] For a useful discussion of the rise and effects of such extreme partisan obstruction and the government dysfunction it has wrought, *see generally* Thomas E. Mann & Norman J. Ornstein, *It's Even Worse Than It Looks: How The American Constitutional System Collided With the New Politics of Extremism* (2012).

rule, reflecting the changes made in the 1970s, eliminates all those burdens. These changes now enable a Senate minority, on the mere threat of a filibuster, to force a sixty-vote supermajority to overcome that threat before the Senate can proceed to a confirmation debate and vote.[12]

The lack of any personal or institutional cost for the filibuster has been accompanied by the Senate's increased employment of this tactic. Prior to any rule changes, from 1961-1970 there was an average of 5.6 cloture motions filed per two-year Congressional session. (Cloture motions, which represent an attempt to end a filibuster, are often used as a proxy for determining the number of filibusters.) The number of cloture motions then steadily rose over the ensuing decades, rising to an average of 41 per Congressional session between 1981 and 1990, and reaching 139 cloture motions in the 2007-2008 Congressional session.[13] Likewise, during President Obama's first term, there was an average of 126 cloture motions in each Congressional session.[14]

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[12] *See* Marziani, *Filbuster Abuse*, *supra* note 2, at 5-6; Sarah A. Binder & Steven S. Smith, *Politics or Principle? Filibustering in the United States Senate* 150-52 (1997); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 Stan. L. Rev. 181, 200-09 (1997).

[13] *See* U.S. Senate, Senate Action on Cloture Motions, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm. *See also* Mann & Ornstein, *supra* note 11, at 84-100.

[14] *See* U.S. Senate, *supra* note 13. *See also* Marziani, *Filibuster Abuse*, *supra* note 2, at 4-7.

Additionally, Senators can also place informal "holds" on nominations, which are often anonymous, by informing the party leadership of the Senator's intent to object to a particular nomination.[15] These holds must also be overcome by a cloture motion, requiring a sixty-vote *supermajority* to confirm any Presidential nominees subject to a hold.[16]

Moreover, the recent use of the filibuster by the Senate minority has been for explicitly partisan and ideological motives, rather than to foster debate about the qualifications of the nominees. For example, in filibustering President Obama's nomination of Richard Cordray to be Director of the Consumer Financial Protection Bureau ("CFPB"), forty-four Republican Senators sent a letter to President Obama stating that "we will not support the consideration of any nominee, regardless of party affiliation, to be the CFPB director until the structure of the Consumer Financial Protection

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[15] Marziani, *Filibuster Abuse*, *supra* note 2, at 2 ("The practice of placing 'holds' is an informal custom by which a single senator can indefinitely . . stop legislation or nominations from reaching the Senate floor. To place a hold, a senator sends a letter to her party's leadership indicating her desire to halt progress on a specified bill or nominee. . . . A request for an indefinite hold contains two implicit threats: first, it signals a senator's intent to object to a unanimous consent agreement; and then, to filibuster the targeted legislation or nomination. . . . Often, senators use this tactic to gain bargaining leverage over other senators or over members of the Executive branch.").

[16] Richard Beth & Valeria Heitshusen, Cong. Research Serv., RL30360, *Filibusters and Cloture in the Senate* 1 (2013) ("Invoking cloture requires a super-majority vote (usually 60 out of 100 Senators.)").

Bureau is reformed."[17] Similarly, holds are frequently employed for reasons unrelated to the nominees at issue. Senators have used holds as leverage to obtain policy concessions on specific benefits for a favored constituency. For example, in 2009, Senator Menendez, a Democrat, placed a hold on two environmental agency nominees to protest the unrelated issue of Cuban trade restrictions. Senator Shelby, a Republican, placed a hold on seventy nominees in February 2010 to obtain earmarked funds for his home state of Alabama.[18]

The unprecedented and excessive use of the filibuster and holds by the Senate minority has restricted the operation of the appointments process envisioned by the Founders, blocking dozens, if not hundreds, of routine appointments for partisan or political reasons regardless of the qualifications of the nominee.[19]

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[17] Senator Richard Shelby, *44 U.S. Sens. To Obama: No Accountability, No Confirmation* (May 5, 2011), http://www.shelby.senate.gov/public/index.cfm/newsreleases?ContentRecord_id=893bc8b0-2e73-4555-8441-d51e0ccd1d17.

[18] Marziani, *Filibuster Abuse*, *supra* note 2, at 13.

[19] Statistics demonstrate the recent rise in Senate obstructionism. From 1979 until 2003, executive branch agency positions subject to Senate confirmation had a vacancy rate of approximately 25%. After President Obama's first year in office, this vacancy rate approached 36%. The Senate is also engaging in increased delay of executive nominees through similar procedural tactics, when not blocking confirmation outright. Under President Clinton, the Senate took an average of 48.9 days to confirm nominees. Under President Bush (II), the average amount of time rose to 57.9 days. Under President Obama, the delay increased still further, to 60.8 days. In March 2010, President Obama had 217 pending nominees in

While this case relates to dysfunction created by filibusters affecting executive officers, these same obstructionist activities by the legislature have also had a devastating impact on judicial appointments and the judiciary. As Chief Justice Roberts stated:

> Over many years, however, a persistent problem has developed in the process of filling judicial vacancies. Each political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes. This has created acute difficulties for some judicial districts. Sitting judges in those districts have been burdened with extraordinary caseloads. . . . There remains, however, an urgent need for the political branches to find a long-term solution to this recurring problem.

Chief Justice John Roberts, U.S. Supreme Court, 2010 Year End Report on the Federal Judiciary 7-8 (2010), *available at* http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf. Nearly ten percent of the entire judiciary was vacant as of mid-year 2012,[20] in large part due to the use—or

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the Senate, who had been awaiting votes an average of 101 days—and including thirty-four nominees who had been pending for more than six months. Alexander Platt, *Preserving the Appointments Safety Valve*, 30 Yale L. & Pol'y Rev. 255, 284-85 (2011).

[20] Bannon, *supra* note 2, at 1 ("[T]he slow pace of nominating and confirming judges has also precipitated a crisis in the

threatened use—of the filibuster. This not only harms judges but millions of Americans who are denied access to justice.

The conflict between the executive and the legislative branch over appointees to the NLRB, the issue that led to this case, shows both the scope of Senate minority obstruction of the appointments process and how the use of such tactics by both parties, if unchecked by the recess appointment power, can paralyze government operations and prevent the President from executing the laws.

In 2007, the terms of three of the NLRB board members were set to expire, thereby depriving the NLRB of the necessary quorum, unless the vacancies were filled. In the belief that the Senate majority could prevent President Bush from filling these vacancies by using the recess appointment power, the Democratic Senate majority leader Harry Reid developed the idea of conducting *pro forma* sessions during a Thanksgiving break and winter recess, expressly to preclude recess appointments.[21] The Senate majority subsequently refused to vote on any of President Bush's nominees, with Democratic Senator Boxer stating that it was "better to have fewer people on the commissions if the people who

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district courts . . . As of July 1, 2013, there were 65 vacancies in the district courts out of a total of 677 judgeships, creating a vacancy rate of almost 10 percent. . . . The high number of vacant judgeships limits the capacity of district courts to dispense justice and affects the millions of Americans who rely on district courts to resolve lawsuits and protect their rights.").

[21] *See* 153 Cong. Rec. S14609 (daily ed. Nov. 16, 2007) (statement of Sen. Harry Reid) ("[T]he Senate will be coming in for pro forma sessions . . . to prevent recess appointments.").

are nominated want to destroy the mission of their particular job . . . I'd rather have nobody."[22] (This Court subsequently invalidated a desperate maneuver by the Board intended to enable it to operate with two members, as a violation of the applicable statutory provisions requiring a three-member quorum. *New Process Steel, L.P.* v. *N.L.R.B.*, 130 S. Ct. 2635 (2010).)

During the first fifteen months of the Obama administration, several of President Obama's appointees to the NLRB were blocked by the Republican Senate minority, with Senator Graham stating, "the NLRB as inoperable could be considered progress," and several other Senators indicating that "they would block any new Obama nominees because of their ire over labor board moves . . . ."[23] Confronting the prospect of a paralyzed NLRB, the President exercised the recess appointment power in March 2010, enabling the agency to continue to function. The Senate minority continued to frustrate the efforts of the President to appoint new NLRB members through the regular appointments process, and the NLRB once again faced the loss of a quorum in January 2012.

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[22] Ryan Grim, *Politics Freezes Regulatory Boards*, The Politico (Feb. 28, 2008), http://www.politico.com/news/stories/0208/8744_Page2.html.

[23] *See* Steven Greenhouse, *Labor Panel is Stalled by Dispute on Nominee*, N.Y. Times (Jan. 14, 2010), http://www.nytimes.com/2010/01/15/us/politics/15nlrb.html?_r=0.; Laura Meckler & Melanie Trottman, *Obama's NLRB Appointments: Why the Rush?*, Wall Street Journal-Washington Wire (Jan. 6, 2012), http://blogs.wsj.com/washwire/2012/01/06/obamas-nlrb-appointments-why-the-rush/.

The Senate minority sought to preclude President Obama from exercising the recess appointment power during the 2011-2012 holiday recess, by enlisting the aid of the Speaker of the House, John Boehner, to compel Senate Majority Leader Reid to conduct *pro forma* sessions during the holiday recess, in an effort to preclude recess appointments.[24] Using the Adjournments Clause's requirement that an adjournment of either House for more than three days be agreed to by both Houses (U.S. Const. art. I, § 5, cl. 4), Speaker Boehner informed Senator Reid that the House would not consent to a Congressional holiday adjournment unless the Senate conducted *pro forma* sessions during this period.[25] This intrusion of the House of Representatives into the appointments process was unprecedented, as the Founders had explicitly precluded the House from any role in the appointments process. The President, maintaining that the *pro forma* sessions could not deprive him of his recess appointment power, made recess

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[24] Senator David Vitter, *Vitter, DeMint Urge House to Block Controversial Recess Appointments*, (May 25, 2011), http://www.vitter.senate.gov/newsroom/press/vitter-demint-urge-house-to-block-controversial-recess-appointments ("Sen. David Vitter (R-LA), Jim DeMint (R-SC) and 18 other senators today sent a letter to Speaker of the House John Boehner asking him not to pass the Senate's adjournment resolution in order to block recess appointments by the Obama Administration.").

[25] Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. Times (Apr. 23, 2013), http://www.nytimes.com/2012/04/23/us/politics/shift-onexecutive-powers-let-obama-bypasscongress.html?pagewanted=all ("House Republicans had been forcing the Senate to hold 'pro forma' sessions through its winter break to block such appointments.").

appointments of three new members to the NLRB. Had President Obama lacked the recess appointment power for any of the reasons advanced by Respondent, the NLRB would have been paralyzed for three years.

A similar illustration is provided by the circumstances that forced President Obama to make a recess appointment of Richard Cordray as director of the CFPB on the same day he made the three NLRB recess appointments. On December 8, 2011, the Senate minority used a filibuster to block the President's appointment of Mr. Cordray to this post.[26] The Senate minority made clear that its refusal had nothing to do with Cordray's qualifications.[27] Rather, as noted earlier, they informed the President in a letter signed by forty-four members of the Senate minority that they would

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[26] John Cushman Jr., *Senate Stops Consumer Nominee*, N.Y. Times (Dec. 8, 2011), http://www.nytimes.com/2011/12/09/business/senate-blocks-obama-choice-for-consumer-panel.html ("[F]ilibustering Republicans who oppose the powers of the new agency successfully challenged one of the administration's main responses to the financial crisis The vote was 53 yes, 45 no.").

[27] *Id.* ("'This is not about the nominee, who appears to be a decent person and may very well be qualified,' said Senator Orrin Hatch, Republican of Utah . . 'It's about a process that is running out of control.'"); Jonathan Weisman & Jennifer Steinhauer, *Senators Reach Agreement to Avert Fight Over Filibuster*, N.Y. Times (July 16, 2013), http://www.nytimes.com/2013/07/17/us/politics/senators-near-agreement-to-avert-fight-over-filibuster.html?pagewanted=all ("'Cordray was being filibustered because we don't like the law' that created the consumer agency, said Senator Lindsey Graham, Republican of South Carolina. 'That's not a reason to deny someone their appointment. We were wrong.'").

not confirm any nominee to the post unless the President agreed to an amendment to provisions of the Dodd Frank law pertaining to the CFPB. *See supra* note 17.

Following Cordray's recess appointment, he was finally confirmed by the Senate on July 16, 2013, almost two years after he was first nominated, as part of an agreement between the Senate majority and minority entered under a threat by the Senate majority leader to eliminate filibusters of Presidential nominees to executive offices. Had President Obama not exercised his recess appointments power to appoint Cordray in January 2012, key functions of the CPFB would have been paralyzed for almost two years, because the Dodd Frank law permits those functions to be performed only by the Director or his designee.[28]

C. The Recent Senate Agreement to Permit an Advice and Consent Vote in Connection With Seven Pending Executive Branch Nominees Does Not Lessen the Need to Preserve a Viable Recess Appointments Clause

The recent Senate agreement, referred to above, that finally resulted in the confirmation of nominees to the NLRB and CFPB, as well as several other posts in which the filling of vacancies had been delayed by the obstructive use of the filibuster, does not lessen the need to reject the efforts to eviscerate the President's recess appointment power. The Senate agreement makes clear that neither

[28] 12 U.S.C. §§ 5493-96 (2010).

Republican nor Democratic Senators are willing to relinquish the filibuster rule—and the current Senate minority specifically emphasizes its right to employ the filibuster again.[29] In such a climate of partisanship, the structural importance of a viable recess appointment power remains crucially important to the functioning of the Article II process. The Founders empowered the President to make timely recess appointments when the Senate was unavailable. The restrictions that the D.C. Circuit and the Senate seek to impose on that power would erase it from the Constitution.

D. The Balance of Risks to Separation of Powers Favors the Government's Interpretation of the Recess Appointment Power

Finally, there is no basis for the fear expressed by the D.C. Circuit that the government's interpretation of the Recess Appointments Clause would enable the President to bypass the normal appointments process. Any such risk is remote and greatly outweighed by the very real risks to separation of powers posed by the D.C. Circuit's restrictive reading that would enable the Senate or a Senate minority to further aggrandize their powers at the President's expense.

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[29] Paul Kane & Ed O'Keefe, *Senate Reaches Tentative Deal On Filibuster Rules*, Washington Post (July 16, 2013), http://articles.washingtonpost.com/2013-07-16/politics/40601790_1_republicans-filibuster-majority ("[T]he Senate rules will remain unchanged – so Republicans can filibuster in the future and Reid can threaten to unilaterally change the rules again.").

As Professor Adrian Vermeule explains:

> [T]he *Canning* court focuses selectively, even to the point of obsession, on a particular target risk, while ignoring countervailing risks, including risks generated by the precautions themselves. . . . [T]he court's narrow interpretation of the recess appointments power indirectly promotes the power of a blocking minority in the Senate. Madison assumed in Federalist 10 that the risk of oppression by entrenched minorities was low, because 'the republican principle . . . enables the majority to defeat [a minority faction's] sinister views by regular vote.' But if that principle is disabled, the risk of presidential aggrandizement has to be weighed against the risk of minoritarian factional oppression.

Adrian Vermeule, *Recess Appointments and Precautionary Constitutionalism*, 126 Harv. L. Rev. F. 122, 123-24 (2013), *available at* http://www.harvardlawreview.org/issues/126/february13/forum_990.php. Indeed, notwithstanding the checks provided by the Recess Appointments Clause as heretofore interpreted by the courts and Presidents alike, Senate Democrats and Republicans have demonstrated their willingness to aggrandize their powers—and to a large extent have already succeeded in doing so. *See supra* pp. 22-24 and notes 12-16. Thus, the greater risk, as the circumstances of this case show, is from an unaccountable Senate

minority with partisan incentives to obstruct the President's ability to carry out his executive responsibilities under Article II.

Moreover, there are important restraints preventing presidential abuse. The Founders provided a significant deterrent by making recess appointments temporary, and so an inadequate substitute for appointees confirmed through the regular appointments process. Of equal importance, the President is accountable to the public in ways that a collective body is not. Any presidential abuse of the recess appointment power would be quickly identified and exploited by the opposing party to the President's disadvantage.

Further, the President has little to gain by abusing the recess appointment power. Were he to delay nominating persons to fill vacancies while the Senate is in session, so that he could unilaterally appoint them during a recess, he would only be damaging his own agenda by depriving himself of assistance he needs to carry it out for the period of the delay. The risks here of legislative aggrandizement therefore clearly outweigh the unsubstantiated risks of presidential aggrandizement.

* * *

In sum, the D.C. Circuit's interpretation of the Recess Appointments Clause would subvert the balance of powers envisioned by the Founders. It would allow the Senate or a Senate minority to aggrandize its powers at the expense of the President and the nation's interest in effective government. It

would enable the Senate to hold the advice and consent process hostage to obstructionist tactics and deprive the President of any alternative means of timely filling vacancies with the officials needed to enable the executive to carry out its responsibilities under Article II, including the duty to take care that the laws be faithfully executed. Permitting the Senate to use *pro forma* sessions to deprive the President of his recess appointment power would have the same effect, eliminating the Recess Appointments Clause as a crucial structural lynchpin for the entire appointments process. This would be a dramatic example of the legislative aggrandizement at the expense of the executive that the Founders most feared.

CONCLUSION

For the foregoing reasons, amicus curiae urges the Court to reverse the Court of Appeals' judgment invalidating the President's recess appointments to the NLRB and to reject the use of *pro forma* sessions of the Senate to prevent the President from exercising his constitutional prerogative to make recess appointments.

Respectfully submitted,

Sidney S. Rosdeitcher
Counsel of Record
Jacob H. Hupart
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
srosdeitcher@paulweiss.com

Burt Neuborne
40 Washington Square South
New York, NY 10012
(212) 998-6172
burt.neuborne@nyu.edu

Wendy Weiser
Diana Kasdan
Alicia Bannon
THE BRENNAN CENTER FOR
JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(646) 292-10013
wendy.weiser@nyu.edu

Attorneys for *Amicus Curiae*
The Brennan Center for Justice

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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In The
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NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING,
A DIVISION OF THE NOEL CORP., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMICI CURIAE, BRIAN W. BULGER, TAMMIE L. RATTRAY AND DAVID A. WIMMER IN SUPPORT OF RESPONDENT NOEL CANNING, A DIVISION OF THE NOEL CORPORATION

BRIAN W. BULGER
Counsel of Record
MECKLER BULGER TILSON MARICK & PEARSON LLP
123 North Wacker Drive, Suite 1800
Chicago, IL 60606
(312) 474-7900
brian.bulger@mbtlaw.com

TAMMIE L. RATTRAY
FORD & HARRISON LLP
101 East Kennedy Boulevard, Suite 900
Tampa, FL 33602
(813) 261-7828

DAVID A. WIMMER
SWERDLOW FLORENCE SANCHEZ SWERDLOW & WIMMER
9401 Wilshire Boulevard, Suite 828
Beverly Hills, CA 90212
(310) 288-3980

Attorneys for Amici Curiae

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING, A DIVISION OF NOEL CORPORATION

INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae Brian W. Bulger, Tammie L. Rattray and David A. Wimmer are each attorneys practicing management-side labor-and-employment law. Together they have 75 years of experience with day-to-day labor relations, advocacy before the National Labor Relations Board ("NLRB" or the "Board") and in counseling and advising clients with respect to compliance with the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.*, and the decisions and regulations of the NLRB.

Amici, and their clients, have a strong and abiding interest in the primary goal of the NLRA – a stable labor-relations climate that avoids undue interruptions of interstate commerce. *See*, 29 U.S.C. §151. The Labor Management Relations Act further clarified Congress' intent that labor policy "prescribe the legitimate rights of both employees and employers in their

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that this brief was not authored in whole or part by counsel for a party, and no person or entity, other than *Amici*, made a monetary contribution for the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3(a), all parties have filed with the Court a letter granting blanket consent to the filing of *Amicus Curiae* briefs in support of either or neither party and, accordingly, have consented to the filing of this Brief *Amici Curiae*. *See*, Docket entries September 3, 2013, September 13, 2013 and November 12, 2013.

relations affecting commerce." 29 U.S.C. §141(b). As counselors *Amici* desire to advise clients of their rights and their obligations under the NLRA in the clearest possible manner. However, frequent flip-flopping and changes to the NLRB's interpretations of those rights and obligations hamper the ability of *Amici* to provide meaningful advice and prevent their clients from important business planning, expansion and other activities due to politically charged, unstable interpretations of labor policies from the NLRB. Quite simply, because of constant changes to NLRB precedents from an ever-changing NLRB membership, *Amici* are unable to opine on and clients are unable to institute efficient labor practices that likely will remain lawful for a reasonable period of time.

By constantly changing its interpretations of the NLRA and the legality of employer labor policies, the NLRB makes it impossible for employers and their legal advisors to formulate legal business practices affecting employees with confidence that those practices are and will in the future be lawful. Constant changes to the "rules" imposed on employers by the NLRB, deprive employers (and employees) of the stable labor-relations climate sought by Congress as a primary goal of the NLRA. *Amici* seek more stability in the NLRB's decision-making process by supporting Respondent Noel Canning's position here.

SUMMARY OF ARGUMENT

Amici write in support of Respondent because we believe that largely unfettered recess appointment powers of the President have contributed to the instability of the law under the NLRA. We here present the Court a view of the President's recess appointment powers not addressed by other participants in this case.

According to the Petitioner NLRB Brief's own Appendices A and B, recess appointments appear to have occurred disproportionately with respect to NLRB appointments. Such recess appointees are, by definition, candidates who were unable to obtain the constitutionally required consent of the Senate to their appointments. That consent usually cannot be obtained because such appointees are considered to be extreme in their labor-relations views by a significant part of the Senate. Such unconfirmed appointees also appear to play a substantial role in creating the changes and uncertainty of the law under the NLRA by virtue of the agendas they bring to the NLRB.

Therefore, we submit that restricting and confining the President's recess appointment powers, as the court below ruled, will have the advantageous effect of bringing a greater degree of stability to NLRB decision-making. *Amici* expect that, if the President's recess appointment powers are limited, less extreme, more moderate and more qualified candidates will be nominated to the Senate, because the President will understand that only well-qualified,

less-controversial nominees will be likely to achieve the Senate's consent. The result, we believe, will be a more measured and practical approach by the NLRB to its duties. This will have beneficial effects for employers, employees and unions by creating more stability in the interpretations of the NLRA by the NLRB, thereby ensuring the stable labor-relations climate that Congress intended as the primary goal of the NLRA.

ARGUMENT

A. Stable NLRB Precedent Will Help To Maintain A Stable Labor Climate

Dean Roscoe Pound famously said: "The law must be stable, but it must not stand still." *Interpretations of Legal History*, 1 Cambridge Press (paperback) 2013. The NLRB, since its inception, has often chosen to turn Dean Pound's saying on its head. Because the NLRB interprets the NLRA primarily through its decisions, rather than rule-making, stable precedent is a particular concern and desire of employers, unions and employees subject to the NLRA and their counsel. Stable precedents are particularly necessary at NLRB, because the Board sets national labor policy primarily through adjudication of individual cases, not substantive rule-making. *See*, *American Hospital Association v. NLRB*, 499 U.S. 606 (1991) (upholding NLRB's first, and to date only, substantive rulemaking regarding scope of bargaining units).

Precedent, and its nature, have been a somewhat amorphous concept at NLRB. In reality, and often recently, the Board has changed direction in significant policy areas on a number of occasions by reversing its prior decisions as the composition of the Board has changed. Such precedential changes often have not been accompanied by detailed analysis demonstrating changed circumstances or a compelling need for a new interpretation of the nation's labor laws. Rather, such changes often occur simply due to a new political majority on the Board.

As Dean Pound declared, change may be necessary to prevent legal stagnation. However, unprincipled change, change for its own sake, or change based simply on a change in which party controls the majority of NLRB members, simply cannot be condoned. Such change, unaccompanied by any real change in underlying circumstances, directly contradicts Congress' mandate to the NLRB to *promote* stability in labor relations, and such constant changes undermine a stable labor-relations climate.

B. Recess Appointments Are Made Disproportionately To The NLRB

Petitioner NLRB's Appendices A and B make clear that recess appointments have increased dramatically over the last 40 years. It appears to us that such appointments have disproportionately been made to the NLRB. Petitioner's Appendix B lists "Illustrative Recess Appointments Made To Fill Vacancies That

Pre-Existed The Recess During Which They Were Made." Appendix B shows:

> 2 of 4 such recess appointments by President Obama were to NLRB.
>
> 3 of 6 such recess appointments by President G.W. Bush were to NLRB.
>
> 1 of 3 such recess appointments by President Clinton was to NLRB.
>
> 1 of 3 such recess appointments by President G.H.W. Bush was made to NLRB.
>
> 4 of 4 such recess appointments by President Reagan were made to NLRB.

NLRB Brief at 84a to 89a.

Thus, Appendix B shows that over the last five Presidential Administrations, three Republican and two Democratic, 11 of 20 such recess appointments, *over 50%*, were to the NLRB. Given the small size of NLRB relative to that of the United States Government as a whole, the rate of recess appointments to NLRB is astonishing. While this list may be only an illustration, it is telling that so many of the illustrations affect the make up of the NLRB.

Why does this occur? As Petitioner's Appendix B shows, these appointments were made to fill vacancies that existed before the recess in which the appointment was made. NLRB's Appendix A also shows a large number of NLRB recess appointments in other circumstances. NLRB Brief at 33a to 64a. We do

not think the Court would appreciate or profit from a detailed accounting of each appointment's circumstances. However, we can assert with confidence that the vacancies existed because the nominees submitted to the Senate by the President could not obtain consent – generally because the nominee was viewed as being either too pro-labor or pro-management in their views.

C. Recess Appointees Are Often Involved In Unnecessary Changes To NLRB Interpretations Of The NLRA

As noted above, NLRB recess appointments are common in both Republican and Democratic Administrations. Both kinds of Administrations have made recess appointees who changed existing NLRB precedent without, we believe, any principled basis or changed circumstances requiring such changes. We concentrate here on some recent examples.

As Petitioner NLRB notes, in August 2011, the Board's membership fell to three members, one of whom was a 2010 recess appointment. On January 4, 2012, the President made *three* recess appointments to the Board. Petitioner NLRB's Brief at 2-3. Some dramatic reversals of NLRB precedent occurred under the 2012 Board and the 2011 Board. As discussed, *infra*, the recess-appointee filled 2012 NLRB has reversed its view on very important issues such as the continuation of dues checkoff after contract expiration and requirements to provide witness statements in arbitration. The 2012 Board also

imposed new obligations on *all* employers, with and without employee representation, by barring, for example, employer requests for confidentiality from employee witnesses during internal investigations absent specific circumstances. The 2011 Board reversed precedent on the long-standing "community of interest" test for determining bargaining units and on the "recognition bar" and "successor bar" doctrines previously approved by the Board. It also created new law applicable to all employers forbidding requests for waivers of "class" arbitration in employment arbitration programs.

In *WKYC-TV, Gannet Co.*, 359 NLRB No. 30 (2012), the Board, with its recess appointees, reversed 50 years of precedent, and held that employers now have a continuing duty to collect dues under a contractual dues-checkoff provision even after expiration of the collective bargaining agreement. Checkoff must be continued until a new contract or impasse is reached. This reduces unions' financial incentive to timely reach a new collective bargaining agreement, as they no longer will have to use their own resources to collect dues. The precedent for not continuing dues collection after expiration dates to the *Bethlehem Steel* case of 1962, 136 NLRB 1500. We believe that no good reason has been provided for this reversal, nor have changes occurred compelling this reversal.

In *American Baptist Homes d/b/a Piedmont Gardens*, 359 NLRB No. 46 (2012), the Board reversed its 1978 holding in *Anheuser-Busch, Inc.*, 237 NLRB 982, that witness statements are excluded

from an employer's general obligation to provide relevant information to unions during grievance processing. Now, the Board will apply a balancing test to weigh a union's need for information against an employer's "legitimate and substantial" confidentiality interests. This new test creates a new obligation for employers in the grievance process and subjects them to the risk of an unfair labor practice if they cannot "balance" union demands to the satisfaction of the NLRB, as opposed to the previous clear test on this issue.

The 2012 Board also reversed its approach to witness confidentiality requests in *Banner Health Systems*, 358 NLRB No. 93 (2012). The employer had asked employee witnesses to maintain confidentiality in all investigations. The Board found this "blanket approach" interfered with employee rights by banning them from speaking with co-workers about matters of mutual concern. Even though no threat of discipline was made, the Board found an employer "request" for silence was unlawful, absent a business justification for the request. At a minimum, employers must now provide a strong justification for any such request or face possible Board action. *Banner Health* imposes yet another new obligation on all employers, regardless of union representation. Once again, employers are largely left to guess whether requesting witness confidentiality, a generally accepted practice in sensitive human resources investigations, will pass muster with the NLRB or subject the employer to liability.

In 2011, up to January 3, 2012, the Board majority, which then included recess appointee Craig Becker, issued a number of significant decisions. In a case likely to make its way to this Court, the Board for the first time announced a very broad rule against class-action waiver agreements in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012). *D.R. Horton* gave a very narrow reading to the Court's decision in *AT&T Mobility v. Concepcion*, 563 U.S. ___, 131 S.Ct. 1740 (2011). In *D.R. Horton*, the employer required employees to sign an arbitration agreement as a condition of employment. The agreement precluded class claims, and permitted the arbitrator to hear only the individual's claim. The Board majority found the agreement contravened substantive NLRA Section 7 rights. "Collective pursuit of a workplace grievance in arbitration is equally protected [like any concerted legal action addressing wages, hours or working conditions] by the NLRA." Thus, the agreement was struck down.

D.R. Horton imposes a brand new obligation (not to seek class-action waivers) on employers *whether or not* their employees are represented by a union. The Court following *Concepcion* recently upheld the validity of a class waiver in a different context. *American Express Co. v. Italian Colors Restaurant*, 570 U.S. ___, 133 S.Ct. 2304 (2013). The Court knows well that removal of the ability to seek class waivers is likely to lead to more litigation, and also undermines the Court's continuing teachings that arbitration is a forum which should not be unduly restricted when

agreed to by the parties. *See, e.g., Nitro-Lift Technologies, LLC v. Eddie Lee Howard*, 568 U.S. ___, 133 S.Ct. 500 (2012).

In *Specialty Healthcare and Rehabilitation*, 357 NLRB No. 83 (2011), an August 26 decision with recess appointee Becker in the majority, the Board established a new test for determining the appropriate size of a prospective bargaining unit. The issue was whether an employer could challenge the make-up of the unit of employees seeking a representation election. The Board established a new test raising the employer's burden from the traditional "community of interest" requirement (which dates from 1962) to an "*overwhelming* community of interest" requirement. "Community of interest" was first discussed in detail in *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962). The community of interest principle was later expanded to other types of representation cases, including cases involving unrepresented employees. *See, NLRB v. Campbell Sons' Corp.*, 407 F.2d 969 (4th Cir. 1969). Other courts and this Court generally have approved the Board's community of interest test, so no need for a change in the standard is apparent. *See, e.g., NLRB v. Action Automotive, Inc.*, 469 U.S. 490 (1985).

Yet, 50 years later, when interpreting *Specialty Healthcare* at the end of 2011, the Board majority, still including a recess appointment, decided that a unit of service agents was appropriate, even though other employees who work with them at the same location were excluded from the unit. The decision

reversed a Regional Director's finding that the proposed unit was too narrow. The Board said that, although all the employees clearly shared a "community of interest," this sharing was not "overwhelming," as required by *Specialty Healthcare. DTG Operations, Inc.*, 357 NLRB No. 175 (2011).

Specialty Healthcare has caused great confusion and concern among employers. The decision opens the way for multiple "micro-units" involving small numbers of employees within a facility, indeed even within a department. By dumping the long-established "community of interest" standard, the Board is heading down a road toward approval of multiple bargaining units within any employer's facilities. This approach can only lead to unit proliferation and to the inefficiencies which flow from that. Moreover, permitting very small groups to organize in this manner runs afoul of the prohibition of Section 9(c) of NLRA, 29 U.S.C. §159(c), that bargaining-unit decisions must not be dictated by the extent of the organization among a particular group of employees.

Although the precedents overturned are of more recent vintage than those recounted above, the Board also took actions restricting employee rights to oppose unionization in two other August 26, 2011 decisions, again including recess appointee Becker. In *Lamons Gasket Co.*, 357 NLRB No. 72 (2011), the Board reversed a 2007 Board decision, *Dana Corp.*, 351 NLRB 434 (2007). The *Dana* decision established modifications to the Board's "recognition bar." Specifically, it created a 45-day exemption period to the recognition

bar when an employer voluntarily recognizes a union. This exemption period permitted employees and other unions to challenge an employer's unilateral recognition of the union through Board processes instituted by the employees shortly after such recognition.

The 2011 *Lamons Gasket* decision described the 2007 *Dana Corp.* decision as " . . . reject[ing] long-standing principle . . . " and as " . . . flawed, factually, legally, and as a matter of policy." The result is that employees or rival unions who wish to challenge actual majority support after an employer voluntarily grants recognition to a union cannot do so for a "reasonable period of time." *Lamons Gasket* defines reasonable time as being a period of at least six months from an initial bargaining session. As a result of the *Lamons Gasket* decision, an employer may unilaterally recognize a union as a bargaining representative *without* the consent of the employees. The employer and union may then agree on a contract, effectively denying employees the ability to challenge such representation until the expiration of the contract under the Board's "contract-bar" policy. Only if no contract is reached within six months after the unilateral recognition will the employees have an opportunity to challenge unilaterally-imposed representation.

In *UGL-UNICCO*, 357 NLRB No. 76 (2011), the Board reestablished the "successor bar." UGL-UNICCO overruled a 2002 Board decision, *MV Transportation*, 337 NLRB 770 (2002). Like *Lamons Gasket*, this 2011

Board decision in support of "bar doctrines" is based on a belief that an established bargaining relationship with an incumbent union should be required to "exist and function for a reasonable period." This requirement prohibits challenges to union majority support by the employer or a rival union – but also by the *employees themselves*. In successorship scenarios – usually the result of a merger or acquisition – the Board now finds a bar to challenges of incumbent union support necessary to mitigate the destabilizing consequences of successorship situations. Board Member Brian Hayes dissented from this reasoning on grounds that there is no stability in a bargaining relationship where the union may not have majority support. In Member Hayes' view, allowing an election does nothing to destabilize "industrial peace" – it either confirms majority support or it exposes a lack of initial stability because the incumbent union no longer maintains employee majority support. Once again, no good reason exists for these changes in precedents determined with recess appointees.

Precedential reversals are not unique to this Administration. In *Materials Research Corp.*, 262 NLRB 1010 (1982), the Board held that unrepresented employees were entitled to assistance from a fellow employee in disciplinary interviews, extending the *Weingarten* rights shared by represented employees. *See*, *NLRB v. J. Weingarten*, 420 U.S. 251 (1975); *Ladies Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276 (1975). Yet, just three years later, a Board including President Reagan's recess appointee, Robert P.

Hunter (later confirmed), reversed *Materials Research* in *Sears Roebuck Co.*, 274 NLRB 230 (1985). The *Sears Roebuck* Board said it had earlier misread the Act, and that unrepresented employees were not entitled to assistance in the absence of a union.

The Board clarified its *Sears* theory under pressure from a Court of Appeals in *E.I. DuPont DeNemours & Co. (III)*, 289 NLRB 627 (1988). A new Board then overruled *DuPont* and returned to the *Materials Research* standard in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000). In the *Epilepsy* majority were Chairman Truesdale, who originally had been a recess appointee and was later confirmed, and Member Fox who was serving as a recess appointee at the time. *Epilepsy Foundation* was itself reversed in *IBM Corp.*, 341 NLRB 1288 (2004). The *IBM* majority included Member Meisburg serving as a recess appointee. Thus, the law in this area, and the obligations of non-union employers, *changed four times* in a 22-year period. Recess appointees were deeply involved in these changes. This cannot demonstrate the kind of stable labor climate that Congress sought to promote under the NLRA.

Although legal ethics dictate advising our clients to comply with any new Board precedent, it is not always readily apparent what an employer must do to be compliant. Moreover, if splits develop among the Circuits regarding the interpretation of a particular Board decision, employers are subject to differing standards depending on geography. Well-reasoned, and rare, reversals of precedent, even if adverse to a

party's interest, may at least permit counsel and their clients to know what the law requires. If NLRB precedents are reasonably stable, an employer can plan and institute appropriate labor policies knowing that frequent modifications to those policies likely is unnecessary. Reducing the number of NLRB recess appointees will, we believe, promote more consistent Board decisions and respect for precedent. This will enhance business efficiency and also stability in labor relations practices.

CONCLUSION

We submit that, while anecdotal, the analysis above demonstrates that recess appointees often are at the heart of precedential shifts involving unnecessary changes and bad policy determinations made through NLRB decision-making. We submit that curtailment by this Court of the President's recess appointments powers could help to reduce the NLRB's capricious decision-making, and this will contribute to the NLRA's goal of a stable labor-relations environment. If the President cannot, or only rarely can, make recess appointments, we believe the most extreme advocates of some particular approach to labor relations will not be nominated. In the absence of broad recess appointment powers, the President will of necessity propose more moderate candidates who have a reasonable chance of confirmation. Such appointees are less likely to make the abrupt policy reversals we now see, and the stable

labor-relations environment that Congress desired will be the result.[2]

Dated: November 25, 2013

Respectfully submitted,

BRIAN W. BULGER
Counsel of Record
MECKLER BULGER TILSON
MARICK & PEARSON LLP
123 North Wacker Drive, Suite 1800
Chicago, IL 60606
(312) 474-7900 – Telephone
(312) 474-7898 – Facsimile

TAMMIE L. RATTRAY
FORD & HARRISON LLP
101 East Kennedy Boulevard, Suite 900
Tampa, FL 33602
(813) 261-7828

DAVID A. WIMMER
SWERDLOW FLORENCE SANCHEZ
SWERDLOW & WIMMER
9401 Wilshire Boulevard, Suite 828
Beverly Hills, CA 90212
(310) 288-3980

Attorneys for Amici Curiae

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[2] The *Amici* do not reside in the Washington, D.C. area. But, we are well aware of the feeling throughout the country that party politics and partisanship have led to a "broken" government. We foresee that the recent confirmation of three NLRB nominees in an apparent bi-partisan package deal accurately illustrates the likely outcome if our argument is accepted. More middle-of-the-road nominees clearly can obtain the Senate's consent for appointment.

AMICUS CURIAE BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP.,

Respondent.

On Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

ILYA SHAPIRO
Counsel of Record
ELISABETH A. GUSFA
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Amicus Curiae

Library of Congress
Law Library

QUESTION PRESENTED

Can the president decide when the Senate is in session?

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Executive interference with the internal functioning of the legislature is a founding grievance of this country. *See The Declaration of Independence* para. 6 (U.S. 1776) ("He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures."); *id.* at para. 7 ("He has dissolved Representative Houses repeatedly."). Although the cast of characters has changed, this Court is asked here to condemn similar usurpations.

This case arises from President Obama's unprecedented attempt to appoint three members to the National Labor Relations Board during a three-day intrasession recess of the Senate.[2] He did this only one day after Congress was constitutionally required to be in session in order to comply with the Twentieth Amendment.[3] No other president has exercised the recess-appointment power during such

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[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored any part of this brief and that only *amicus* made a monetary contribution to its preparation or submission.

[2] *See* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1483 (2005) (defining "intrasession" as a "typically shorter recess taken during a session" of Congress, while an "intersession" one is "the recess between two sessions of a Congress").

[3] U.S. Const. amend. XX, § 2 ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.").

a brief Senate break,[4] and no other president has granted himself the power to define a Senate "session." The government concedes that a break of less than four days is "effectively *de minimis*" and "would not trigger the President's recess-appointments authority," Pet. Br. 18, so the Senate's Jan. 3 session must be defined out of existence if the president's Jan. 4 appointments are to be valid.

This case can thus be decided by answering one question: Who decides whether the Senate is in session? That question is the lowest common constitutional denominator for this case, and it is all that this Court needs to rule for the Respondent.

The Cato Institute was established in 1977 as a nonpartisan policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was founded in 1989 to restore the principles of government that protect liberty. To that end, Cato host conferences and publishes the annual *Cato Supreme Court Review*. This case concerns Cato because it addresses the scope of executive power and the incredible claim that the president can determine when the Senate is in session.

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[4] The government concedes that the president cannot make recess appointments during *intra*session breaks of three days or less. Cert. Pet. at 21; *see also Executive Power-Recess Appointments*, 33 Op. Att'y Gen. 20, 8-9 (1921) ("[D]oes it not necessarily follow that the power exists if an adjournment for only 2 instead of 28 days is taken? I unhesitatingly answer this by saying no . . . ."); Henry B. Hogue & Maureen Bearden, Cong. Research Serv., R42329, *Recess Appointments Made by President Barack Obama* 12 (2012) (In the last 30 years, "the shortest intrasession recess during which a President made a recess appointment was 10 days.").

SUMMARY OF THE ARGUMENT

While this is a case of first impression for this Court, it is also a constitutional endgame for the Recess Appointments Clause. Two hundred years of opinions from attorneys general have whittled the Clause to a wispy rule untethered from constitutional text, structure, or history. The "rules" expressed in the government's brief—10-plus days is okay; three days not quite; sometimes the president can decide otherwise—should be recognized for precisely what they are: the culmination of a string of self-serving opinions from the executive branch seeking to increase the president's power. Now is the time to say "no." Either the president has essentially unreviewable discretion in determining what constitutes a "real" Senate session, or the Recess Appointments Clause is an enforceable provision that provides more than political constraints.

Indeed, any theory of governance under a system of checks and balances would leave each branch's internal rules to the discretion of that branch, even if that discretion is used for purely "political" obstructionism. The Constitution contemplates politics, of course, so the frustrations of the political branches should not be permitted to undercut a wise and necessary element of the separation of powers.

The executive—which the legislative branch must "check and balance"—cannot be trusted to decide whether the Senate is "actually" in session. For the same reasons, this Court should not decide what constitutes a Senate session. Such a decision would only create an ad hoc list of vague criteria with no basis in either the Constitution or good governance.

Although *amicus* endorses the original public meaning of the Recess Appointments Clause as expounded by the D.C. Circuit—that recess appointments can be made only during *inter*session recesses, and only to fill vacancies that arise during such recesses—the Court need not go that far to hold the president's appointments unconstitutional.[5]

Moreover, to allow the president the power he seeks here would sever the appointments process from *any* meaningful ties to the Constitution. If the president's actions are not reversed, the Senate will increasingly have to jump through hoops of the president's creation to perform its constitutional duty to provide advice and consent on presidential nominees. It will be forced to examine not whether it is in session according to its own rules—a straightforward question—but whether the president, in his or her discretion, will consider the body to be "actually" in session.

This Court should affirm the judgment of the court of appeals to prevent the complete evisceration of the Recess Appointments Clause.

ARGUMENT

I. THE SEPARATION OF POWERS DEMANDS THAT THE SENATE BE ALLOWED TO DETERMINE WHEN IT IS IN SESSION

In early colonial times, King Charles I famously "abridged the liberties of English subjects" when he

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[5] The parties' briefs discuss at length the relative validity of intersession versus intrasession appointments. Regardless of the Court's views on that issue, President Obama's Jan. 4, 2012, appointments are too broad an assertion of executive power.

"did not call Parliament into session for eleven years" merely because Parliament was being uncooperative. Kathleen A. Keffer, *Choosing a Law to Live by Once the King is Gone*, 24 Regent U.L. Rev. 147 (2012). While President Obama's intrusions on congressional operations do not rise to the level of King Charles I's "11-years' tyranny," *id.*, his use of the recess-appointment power does purport to trump the Senate's determination of when it is in session.

Yet it is well established that the president lacks the authority to change the Senate's internal rules. It would thus flout fundamental principles of separation of powers to allow the president to determine the operating procedures of another branch, one that checks executive power.

In order to guard against the corrupting effects of accumulated power and prevent a strong executive from dominating the rest of the new federal government, the Founders allocated power among three independent branches. As James Madison explains in *The Federalist No. 51* (Clinton Rossiter ed., 1961): "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." This Court is called upon to do precisely that in the context of executive interference with legislative prerogatives.

A. The Constitution gives the Senate the power to set its own rules.

The president may not change the Senate's internal procedures. U.S. Const. art. I, § 5 ("Each House may determine the Rules of its Proceedings."). The Founders understood that "[e]ach house of

Congress possesses this natural right of governing itself," including "fixing its own times and places of meeting." Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790), *reprinted in* 2 The Founders' Constitution, art. I, § 5, c. 1-4, Doc. 14.

This Court has long affirmed that clear and basic constitutional rule. In *United States v. Ballin*, 144 U.S. 1 (1892), for example, the Court evaluated a House rule allowing non-voting members to be included when determining the presence of a quorum. The Court held that the power of each house to make its own rules is "absolute and beyond the challenge of any other body or tribunal," *id.* at 5, and thus held the House rule to be valid. The Court thus refused to micromanage those House rules:

> Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights . . . . But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just.

Id.

Under this framework, *neither* the judiciary and *nor* the executive can challenge the internal rules of either house. The Rulemaking Clause "clearly reserves to each House of the Congress the authority to make its own rules, and judicial interpretation of

an ambiguous House Rule runs the risk of the court intruding into the sphere of influence reserved to the legislative branch under the Constitution." *United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995); *see also Marshall Field & Co. v. Clark*, 143 U.S. 649, 672 (1892) (There is "respect due to a coordinate branch of the government.").

It would be shocking if any branch were given the power to determine the internal rules of another branch that serves as a check on its power. Ceding too much authority to one branch unbalances the Framers' careful constitutional structure.

B. The separation of powers demands a clear division between the executive and legislative branches.

The Framers understood that maintaining distinct spheres of government was "essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361 (1989). At its core, "[t]he doctrine of separation of powers is concerned with the allocation of official power among the three co-equal branches of our Government. The Framers 'built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Clinton v. Jones*, 520 U.S. 681, 699-700 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)). This Court has recognized that "even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757 (1996).

The functioning of checks and balances depends on the separation of powers. Before one branch can check another's expansive tendencies, the branches must be separated and the divisions between them scrupulously maintained. At the very least, the internal procedures which are the prerogative of each branch cannot be usurped by another.

The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, is a "checks and balances" clause within the separation-of-powers system. During the Constitutional Convention, the Framers extensively debated the proper method to appoint executive officers and judges. See Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 Harv. J.L. & Pub. Pol'y 103, 110-23 (2006). That debate centered on advice and consent being the "normal" method of appointment. *Id.* The delegates feared that if one branch had too much power over appointments, then "intrigue and partiality" would result. *Id.* at 111 (quoting James Wilson).

In short, recess appointments were never meant to be an expansive constitutional power. To the contrary, it is a mere "auxiliary method of appointment, in cases to which the general method [is] inadequate." *The Federalist No. 67*, at 409 (Hamilton) (Clinton Rossiter ed., 1961). "The ordinary power of appointment is confided to the President and Senate *jointly*," with the advice and consent function providing "an excellent check upon a spirit of favoritism in the President." *Id.*

The government's argument that the president can undercut the Senate's determination that it was in session demonstrates that the Framers' fears were

justified. Such a view smacks of the tyrannical executive power that Thomas Jefferson once warned would "come in its turn, but at a more distant period." Arthur M. Schlesinger, Jr., *The Imperial Presidency* 377 (Houghton Mifflin Co., 4th ed. 2004) (quoting a letter from Thomas Jefferson to James Madison). Madison also warned of the gradual accumulation of power in one branch: "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." *The Federalist No. 51* (Madison) (Clinton Rossiter ed., 1961). Although the president has the constitutional duty to keep the government running, that job does not grant him unbounded discretionary power to override internal legislative determinations.

In *Clinton v. City of New York*, Justice Kennedy emphasized that the "[s]eparation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority" because a "concentration of power in the hands of a single branch is a threat to liberty." 524 U.S. 417, 450-52 (1998) (Kennedy, J., concurring). Indeed, historical evidence demonstrates that the executive power was never meant to be an unbridled power concentrated in the hands of one person.

As Justice Frankfurter explained in *Youngstown Sheet & Tube Co. v. Sawyer*, "[t]he example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in

his image." 343 U.S. 579, 641 (1952) (Frankfurter, J., concurring). These restraints should not be ignored today. As James Madison put it in *The Federalist No. 51*, "[a]mbition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government." It is through the tensions between competing interests that the necessary balance of power is preserved—and upon which the indispensable individual liberties of a free society depend.

C. The Senate's prerogative to make its own rules allows for political obstruction and ideological impasses.

The Framers were certainly aware that politics can get messy. They were also aware that the appointments process would have the potential for obstructionism and political intrigue. In fact, they designed it that way by including it as part of a system of checks and balances. Of all the branches of government, this Court is best positioned to see through political grandstanding and to enforce a non-political, constitutionally grounded rule—namely, that the Senate decides if it is in session.

Despite the complaints of modern presidents and pundits, political impasses are not an unforeseen and modern innovation. The Founding generation saw politics at its worst—for example, the beating of Rep. Matthew Lyon by Rep. Roger Griswold on the floor of Congress on Feb. 15, 1798, *Representative Roger Griswold of Connecticut Attacks Matthew Lyon of Vermont on the House Floor*, History, Art, & Archives of the U.S. House of Representatives, available at

http://history.house.gov/HistoricalHighlight/Detail/35645 (last visited Nov. 19, 2013). Nevertheless, the Framers still included the advice and consent requirement for appointments. Holding up appointments, or even refusing to vote on them, is not a bug in the Constitution, but a feature. Presidents are free to complain about that feature and to try to bring the scorn of the people upon the legislature, but they are not free to ignore it.

President George W. Bush complained that he needed to make recess appointments to overcome the supposed "unprecedented filibuster that Senate Democrats" used to block nominees. *Bush Uses Recess Appointment to Put Nominee on the Court*, Feb. 20, 2004, CNN.com, http://www.cnn.com/2004/LAW/02/20/bush.pryor. President Obama similarly complained that "a minority in the Senate" is "put[ting] party ideology ahead of the people they were elected to serve." Jennifer Liberto, *Obama Recess Appoints Consumer Bureau Chief*, Jan. 4, 2012, CNN.com, http://money.cnn.com/2012/01/04/news/economy/consumer_bureau_cordray. These statements are pure politics and have no place in constitutional analysis.

Obstructionism has always been part of politics, and the Senate is under no constitutional duty not to obstruct nominees, nor to give every nominee an "up or down vote." White, *Toward the Framers' Understanding of "Advice and Consent,"* *supra*, at 145-48. A president can be understandably frustrated that the Senate is refusing to approve nominees but, at bottom, that is a frustration with the Constitution. Many Framers would probably say that if the president is frustrated, then their system of checks and balances is doing its job.

So what is a president to do when faced with a recalcitrant Senate? The answer is imbedded in the Constitution: compromise. Checks and balances is a system designed to elicit compromise. To allow the president the power he seeks here would further undercut this aspect of good governance.

II. IN PRESUMING THAT HE CAN DEFINE A SENATE RECESS, THE PRESIDENT CREATED AN ARBITRARY, DANGEROUS, AND UNPRECEDENTED STANDARD FOR DETERMINING WHAT IS A "REAL" SESSION

1. After the president appointed the NLRB members at issue, the Office of Legal Counsel issued a memo explaining when the president can determine whether the Senate is in session. See, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. _ (Jan. 6, 2012) ("OLC Memo"). Understanding that it was breaking new ground, the OLC tried to avoid the impression that the president could arbitrarily define whether the Senate is in session. The government's brief here takes a similar tactic. Pet. Br. 44-64. Both documents fail to cabin the president's claim of arbitrary power.

The OLC offered a bright-line rule for the president to follow in determining if the Senate is "actually" in session: namely, when the Senate "expressly provides that there is to be 'no business conducted' . . . the President may properly rely on the public pronouncement . . . in determining whether the Senate remains in recess." *Id.* at 21 (slip op.); *see also* Pet. Br. 44. At the time the president made the appointments here, the Senate schedule expressly

provided that the Senate would "convene on Tuesday, January 3, at 12 p.m. for a pro forma session only, with no business conducted, and that following the pro forma session the Senate adjourn and convene for pro forma sessions only, with no business conducted." 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden).

Under the government's approach, three words—"no business conducted"—confer the incredible power to make recess appointments even when the Senate is convening every three days. Even if such magic words had magic constitutional significance, however, the OLC memo establishes broad presidential discretion not cabined by the Senate's pronouncements. "[E]ven absent a Senate pronouncement that it will not conduct business, there *may be circumstances* in which the president could *properly conclude* that the body is not available to provide advice and consent of a *sufficient* period to support the use of his recess appointment power." OLC Memo at 21 (emphasis added). What those "circumstances" may be, and what is a "sufficient period," is left to the president's discretion. In other words, even if the record does not say "no business conducted," the OLC claims that the president may still exercise the recess-appointment power by unilaterally declaring the Senate not to be in session.

2. Although *amicus* believes it irrelevant to the central question of *who* decides whether the Senate is in session, it is worth noting that on December 23, a Senate that was in recess according to the OLC and the government's brief, Pet. Br. 44-64, passed an extension of the payroll-tax cut, which the president then signed into law. 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). And only four months earlier, the

government's idea of a "recessed" Senate passed the Airport and Airway Extension Act during a *pro forma* session. *Id.* at S5297 (daily ed. Aug. 5, 2011). The Senate has also used many *pro forma* sessions to satisfy its constitutional duty, under U.S. Const. art. I, § 5, cl. 4, not to adjourn for more than three days without the House's permission. *See, e.g.*, 95 Cong. Rec. 12,586 (Aug. 31, 1949); 95 Cong. Rec. 12,600 (Sept. 3, 1949); 97 Cong. Rec. 2898 (Mar. 26, 1951).

Moreover, even when the Senate is in an "actual" session—at least according to the government—it is possible for it to "go through the motions" and accomplish little or no business. During quorum calls, for example, defined in the Senate glossary as a "call of the roll to establish whether a quorum is present," *see, U.S. Senate Glossary*, available at http://www.senate.gov/reference/glossary_term/quorum_call.htm, a clerk will often call names of senators for hours.[6] But the quorum calls are a "sham." David A. Fahrenthold, *Senate Legislation May Slow, But Quorums Continue*, Wash. Post, June 9, 2011, available at http://articles.washingtonpost.com/2011-0609/politics/35266240_1_senate-floor-quorum-formal-adjournment. "The Senators aren't coming. Nobody expects them to." *Id.* During 2011, such quorum calls took up 33 percent of the first 153 days of the session. Such activity could certainly satisfy the Latin definition of "pro forma," or "as a matter of form." Dictionary.com, Definition of "Pro Forma," http://dictionary.reference.com/browse/pro+forma.

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[6] C-SPAN junkies will have noticed that "Mr. Akaka," the long-serving but recently retired senator from Hawaii, has now been replaced as the first name in the roll with "Mr. Alexander," the senior senator from Tennessee.

So *pro forma* sessions can fulfill constitutional duties and pass legislation, while "actual" sessions may do neither. Yet President Obama has given himself the authority to determine whether the Senate is actually in session and the OLC has affirmed this self-grant of power—stating that the president's actions are meant to ensure that *pro forma* sessions are not "used to prevent the President from exercising his constitutional authority to make recess appointments when *he determines* that the Senate is unavailable to provide advice and consent." OLC Memo at 19 (emphasis added). According to the OLC, what distinguishes other *pro forma* sessions is that they are used for "parliamentary purposes" and, unlike those uses, there is "no evidence of a tradition" in using *pro forma* sessions to block nominees. *Id.* In other words, the president has vested himself with the ability to decide whether a session is being held for "parliamentary purposes," even if the session is otherwise required by the Twentieth Amendment or used to pass legislation. In addition, President Obama has allowed himself to determine what is and is not legislative "tradition."

In essence, the OLC opinion gives the president carte blanche to override the Senate's own determination that it is in session. This is plainly wrong. The president was never meant to have the unlimited authority to bypass the Senate's advice and consent function; the latter was meant to be a "check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters form State prejudice, from family connection, from personal attachment, or from a view to popularity." *The Federalist No. 76*, at 456 (Hamilton) (Clinton Rossiter ed., 1961). Indeed,

"[t]he manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 883 (1991) (internal quotation marks and citation omitted).

The government's brief tactfully avoids raising the OLC's astounding affirmation of executive discretion. (Has the government abandoned that position for this litigation?) Yet it is telling that, when litigation seemed unlikely, the executive branch did not feel obliged to adopt any meaningful constitutional standard. Such legerdemain fits into a historical pattern of executive self-aggrandizement via the Recess Appointments Clause.

This Court, by affirming the clear constitutional rule that the Senate decides when and if it is in session, can forestall the inevitable debates over the "circumstances" when the Senate is available or what constitutes a "sufficient period" of time. Those future arguments are predictable: What does it mean to be "unavailable" in a time of video conferencing and air travel, not to mention unforeseen future technologies? What are the features of a presidentially determined "crisis" that requires an appointment during a recess of less than three days?

One simple rule will avoid having the Recess Appointments Clause eviscerated by the minutiae of unprincipled political chatter: The Senate alone decides when and if it is in session.

III. THE SLOW EROSION OF THE RECESS APPOINTMENTS CLAUSE HAS REACHED A CONSTITUTIONAL ENDGAME SUCH THAT THIS COURT MUST PREVENT THE CLAUSE'S COMPLETE EVISCERATION

The Recess Appointments Clause has endured 200 years of constitutional erosion that threatens to thwart the senatorial check on the president's appointment power. Most legal opinions on the Clause been written by attorneys general or the Office of Legal Counsel. Almost always, the occasion for these opinions was a president's attempt to appoint a nominee during a slightly shorter recess than had been attempted before. Unsurprisingly, the opinions generally concluded that the appointment was permissible. The cumulative effect of these opinions has been the redefining of a Senate "recess" *by the executive* into shorter and shorter periods. It has also resulted in a reconceptualization of the recess-appointment power as an executive prerogative that the Senate often infringes rather than a limited exception to the constitutionally prescribed joint-appointment process.

The first major opinion that broadened the Recess Appointments Clause was written by Attorney General William Wirt during the Monroe administration. Wirt argued that vacancies can undermine the "[s]ubstantial purpose of the constitution," which was "to keep these offices filled," and thus "powers adequate to this purpose were intended to be conveyed." 1 Op. Att'y Gen. 631, 632 (1823). He did not see any danger in the possibility that presidents might use a broadened appointment power to circumvent the Senate. He also understood, howeverm that the power might be regarded as

dangerous and thus offered reassuring words that "[t]he construction which I prefer is perfectly innocent," and it "cannot possibly produce mischief."

But mischief not only occurred, it continues. Over the next 200 years, the drift of AG and OLC opinions continually redefined a Senate "recess" to increase executive power and narrow Senate power. Wirt's writing opened the door to an avalanche of opining that relied on his basic reasoning. *See*, 2 Op. Att'y Gen. 525 (1832) (Taney), 4 Op. Att'y Gen. 523 (1846) (Mason), 7 Op. Att'y Gen. 186 (1855) (Cushing), 10 Op. Att'y Gen. 356 (1862) (Bates), 11 Op. Att'y Gen.179 (1865) (Speed), 12 Op. Att'y Gen. 32 (1866) (Stanbery), 12 Op. Att'y Gen. 449 (1868) (Everts), 16 Op. Att'y Gen. 522 (1880) (Devens), 18 Op. Att'y Gen. 29 (1884) (Brewster), 19 Op. Att'y Gen. 61 (1889) (Miller), 30 Op. Att'y Gen. 314 (1914) (Gregory), and 33 Op. Att'y Gen. 20 (1921) (Daugherty).

The final opinion cited above, from President Harding's Attorney General Harry Daugherty, opened the door to further growth of executive power by expanding the definition of "recess" to include—for the first time—*intra*session recesses. Daugherty argued that the key question was whether the Senate was in a "real and genuine recess." 33 Op. Att'y Gen. at 25. Now, of course, the question is not even whether there is a "real and genuine recess," but whether there is a "real and genuine session."

Since Daugherty's opinion, the arguments made by the attorneys general or the OLC have been predictable: if previous opinions determined that an intrasession recess of 18 days satisfied the Recess Appointments Clause, then why is 17 days not also acceptable? And if 17 days is acceptable, why not 16?

And so on. President George H. W. Bush made several appointments during intrasession recesses of 12 days. Michael A. Carrier, Note, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2210 (1994). President Clinton made a controversial appointment during a 10-day recess. Lee Davidson, *Hatch Ruffled over Gay Revelry at Swearing-In of Ambassador*, Deseret News, June 30-July 1, 1999, at A5. President George W. Bush followed suit. Geoff Earl, *Kennedy Eyes Suit on Pryor*, The Hill, Feb. 26, 2004. The government's concession that a recess of three days or fewer would be a *de minimis* exception. Pet. Br. 18, is similarly not rooted in any constitutional principle.

The appointments process has thus endured constitutional erosion since General Wirt's 1823 opinion. Because courts have largely stayed out of appointments controversies, this erosion predictably springs from one branch of government defining the scope of its own power. President Obama's appointments of NLRB members created a new baseline for unconstitutional encroachment on senatorial power that will surely expand.

Due to the president's partial reliance on "public pronouncements of the Senate," 36 O.L.C. at 21, what will predictably follow from this new baseline will be an attempt by the Senate to preserve its constitutional authority by redefining how business is done—or, more specifically, how it *says* business will be done. But the Senate should not have to resort to such linguistic cat-and-mouse games to preserve its constitutionally delegated powers. Moreover, as discussed *supra*, the president has not wedded himself to reliance on "public

pronouncements of the Senate," thus guaranteeing that the cat-and-mouse game will continue until a third party of competent jurisdiction resolves the dispute with clarity and authority.

This Court is presented with an opportunity to check the president's dangerous assertion of power. As Justice Frankfurter acknowledged in the Steel Seizure Case: "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring). Without this Court's intervention, nearly 200 years of a constitutional slippery slope will quickly become a constitutional precipice.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ILYA SHAPIRO
Counsel of Record
ELISABETH A. GUSFA
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

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AMICUS CURIAE BRIEF

RECORD
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BRIEFS

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP, ET AL., *Respondents*.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

Brief *Amicus Curiae* of Citizens United, Citizens United Foundation, U.S. Justice Foundation, Gun Owners of America, Gun Owners Foundation, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, and Conservative Legal Defense and Education Fund in Support of Respondents

MICHAEL BOOS
CITIZENS UNITED
Attorney for Amici Curiae CU and CUF

MICHAEL CONNELLY
U.S. JUSTICE FDN.
Attorney for Amicus Curiae U.S. Justice Foundation

WILLIAM J. OLSON*
HERBERT W. TITUS
ROBERT J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

*Counsel of Record
November 25, 2013

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INTEREST OF THE *AMICI CURIAE*[1]

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

1. The Senate's role of "advice and consent" to the Executive's nominees for federal office is a critical component of the Constitution's system of checks and balances. The convention debates confirm that the clause was designed to eliminate the British system of patronage, and ensure that the President did not have a power similar to English kings to appoint nobles to the royal court. In this case, the President clearly seeks to violate that structural limitation on executive power, by unilaterally appointing nominees to the National Labor Relations Board whom the Senate refused to confirm.

The recess appointments power was designed to give the President a very narrow, limited authority, to be used only when there was no convened Senate to consider nominations. This power was especially important during the early years of the republic, when "intersession recesses were regularly six to nine months." However, with the exponential growth of the federal government, there is almost never a time when the Senate is unable to perform its authorities to advise and consent.

While the recess appointments power could be viewed as a relic of a bygone age, it is not within this Court's power of judicial review to disregard the original meaning of the constitutional text. In compliance with established rules of constitutional interpretation, the court of appeals below found that "the recess," referred to in Article II, Section 2, Clause 3 was limited to the singular recess between two

constitutionally-mandated annual sessions of the Senate, as provided by Article I, Section 4, Clause 2. Additionally, adhering to established principles of construction, the court below determined that the recess appointment power was limited to filling only those vacancies that "happen" to occur during an intercession recess, not vacancies that may "happen" to exist during any occasional recess within any particular session.

2. In this case, two of the President's three appointments to the NLRB were to positions that had been vacant for some time. Indeed, the President had already submitted their names to the Senate for confirmation, but the Senate had not consented. Nevertheless, even though the Senate had not formally voted "no," it also had refused to vote "yes." The President was free to make more moderate nominations, which might have been confirmed. Instead, he used the recess appointment power in clear disregard of the will of the Senate, which had chosen to take no action.

The Constitution does not impose upon the Senate a duty to rapidly fill vacancies for the President. Nor does the Constitution confer upon the President the power to determine how or when the Senate should act upon his nominees and to confirm unilaterally any nominee out of necessity. Nor by its inaction has the Senate "acquiesced" to this usurpation of its power by the Executive.

3. This case must be viewed as a backdrop to a larger usurpation and accumulation of power by the

Executive Branch, part of a trend of "gradual concentration of the several powers in the same department" that the founders countenanced against. Not only does this aggrandizement of power in numerous executive departments and administrative agencies lessen the power of the legislative branch, "the people" are harmed "when one branch encroaches on another."

Here, unconfirmed appointees held their offices based on the unilateral decision of one man — and to him alone were beholden. The framers realized that Congress would best represent and protect the people, yet these recess appointees were not vetted by the people's representatives.

ARGUMENT

I. THE POWER OF THE SENATE TO ADVISE AND CONSENT TO SENIOR PRESIDENTIAL APPOINTMENTS IS A VITAL CHECK UPON THE EXECUTIVE POWER.

A. The Power of the Senate to Advise and Consent is a Central Component of the Constitutional System of Checks and Balances.

America's national government is based on the separation of powers, with the Constitution vesting the legislative power in the Congress (Article I, Section 1), the executive power in the President (Article II, Section 1), and the judicial power in a Supreme Court and such other courts as the Congress may establish (Article III, Section 1). At the same time, ours is also a government of checks and balances, with the Constitution delegating a number of specific powers to various branches that restrict powers that would otherwise have been wholly vested in another branch. This system was designed with the end that "public liberty" be secured. *See* 1 Joseph Story, Commentaries on the Constitution § 525, p. 393 (5th ed., Little Brown: 1891). As James Madison observed:

> [Separation of powers] does not require that the legislative, executive, and judiciary departments ... be wholly unconnected with each other. [Rather,] unless these departments be so far connected and blended, as to give to each a constitutional control over

> the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained. [*The Federalist No. 48*, p. 256 (G. Carey & J. McClellan, eds., Liberty Fund: 2001).]

Patterned after the mixed power systems already extant in state constitutions, the United States Constitution contains a number of specific delegations of one or more of the three kinds of powers to one or more of the three different branches. *See The Federalist No. 47* at 249-55. Although there was significant opposition to the specific "mixture of powers" embodied in the federal constitution,[2] Madison defended the chosen system of checks and balances as one that had been carefully calibrated to provide:

> [G]reat security against a gradual concentration of the several powers in the same department, consist[ing] in giving to those who administer each department, the necessary **constitutional means**, and personal motives, to resist the encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of the attack. Ambition must be made to counteract ambition. [*The Federalist No. 51*, at 268 (emphasis added).]

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[2] *See* 1 Story's Commentaries at §544.

The appointments power was the product of a robust debate in Philadelphia. Joseph Story observed in his Commentaries that "[i]n the first draft of the Constitution, the power was given to the president to appoint officers in all cases, not otherwise provided for by the Constitution; and the advice and consent of the senate was not required." 2 J. Story, Commentaries on the Constitution, §1526, p. 351 (5th ed., Little Brown: 1891). In this same first draft, the Senate, not the President, was empowered "to appoint Ambassadors and judges of the Supreme Court." *Id.*

Had this early draft been adopted, the power of the president to choose officers in the executive branch of government would have gone unchecked, and would have resembled "the prerogative of erecting and disposing of offices" exercised by the English kings. *See* 1 William Blackstone, Commentaries on the Laws of England, 262 (U. of Chi. facsimile ed.: 1765). America's founders turned away from this unfettered, monarchical practice, to one that most founders believed to be more fitting of a republican form of government — permitting the President the prerogative only to make nominations, but constraining his power to appoint only those nominees who received the consent of the Senate, except for "such inferior officers, as [Congress] thinks proper." *See* Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 883-84 (1991).

Even after the Constitution was ratified, John Adams voiced strong objection to "[t]he negative of the senate upon appointments," expressing his opinion that "it lessens the responsibility of the president" and

"introduce[s] corruption of the grossest kinds, both of ambition and avarice...." Letter of John Adams to Roger Sherman (July 1789), reprinted in 4 The Founders' Constitution, at 106-07 (item 45) (P. Kurland & R. Lerner, eds., U. of Chi. Press: 1987). Roger Sherman demurred, contending that:

> the senate, being a branch of the legislature, will naturally incline to have [the laws] duly executed, and, therefore, will advise to such appointments as will best attain that end[,] [whereas] if the president alone was vested with the power of appointing all officers, ... he would be liable to be deceived by flatterers and pretenders to patriotism, who would have no other motive but their own emolument. [Letter of Roger Sherman to John Adams (July 1789), *id.* at 108 (item 46).]

Years later, Story optimistically summed up the Senate check upon the President's appointment power:

> [T]he patronage of the government and the appointments to office are too important to the public welfare not to induce great hesitation in vesting them exclusively in the President. The power may be abused; and assuredly it will be abused, except in the hands of an executive of great firmness, independence and integrity, and public spirit. It should never be forgotten, that in a republican government offices are established and are to be filled, not to gratify private interests and private attachments: not as a means of corrupt influence, or individual

> profit; not for cringing favorites or court sycophants; but for purposes of the highest public good, to give dignity, strength, purity, and energy to the administration of the laws. [2 Story's Commentaries at § 1530.]

B. The Recess Appointments Power Was Not Designed to Allow the President Broad Authority to Bypass the Senate's Power to Advise and Consent.

Article II, Section 2 of the Constitution vests in the Senate the negative power to block certain appointments — by withholding its advice and consent. The affirmative power of the President to "nominate," however, stands constitutionally unfettered. As Story observed in his Commentaries, "[t]he President is to nominate, and thereby has the sole power to select for office; but his nomination cannot confer office, unless approved by a majority of the Senate." 2 Story's Commentaries at §1531. The power of each branch is "complete and distinct," the Senate having no power to "compel [the President] to yield to their appointment," but only to negative the President's nominee. *Id.*

Article II, Section 2, Clause 3 provides for a narrow exception to this rule. It reads:

> The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

According to the court of appeals below, "[t]he available evidence shows that no President attempted to make an intrasession recess appointment for 80 years after the Constitution was ratified." Canning v. NLRB, 705 F.3d 490, 501 (D.C. Cir. 2013). Indeed, it was generally assumed that the President's recess appointment power "would allow the filling of vacancies 'without delay' [only] during periods of Senate absence." *See* H.B. Hogue, "Recess Appointments: Frequently Asked Questions," p. 1 (CRS: June 7, 2013). "This interpretation," a Congressional Research Service specialist has opined, "is supported by the fact that both houses of Congress had relatively short sessions and long recesses during the early years of the Republic." *Id.* Thus, the court below reported that recess appointments during a session of Congress were "exceedingly rare," observing that "[p]residents made only three documented intrasession recess appointments prior to 1947." Canning, 705 F.3d at 502.

"Throughout the history of the republic," CRS specialist Henry Hogue has observed, "Presidents have ... sometimes used the recess appointment power for political reasons[,] temporarily install[ing] an appointee who probably would not be confirmed by the Senate." Hogue, "Recess Appointments" at 1. However, as the federal government assumed new powers with the New Deal, and as Congress continued the growth of government — proliferating additional commissions, bureaus, and departments and, in the process, adding to the number of appointments needing the Senate's consent — the need arose to find other methods for the temporary filling of vacancies.

See Canning, 705 F.3d at 511. Additionally, as government grew, Congress found itself in session year round, virtually erasing the original need for the President to fill vacancies without the advice and consent of the Senate. Today, there is no real time when the Senate is unavailable, its members typically only hours away from nation's capital. Further, with the growth of the federal government came the multiplication of controversy generated by a wide swath of government programs, leading to threats of filibuster over some of the more controversial nominees.

Yet, even as the need for recess appointments has dwindled, presidents from both parties have used the power far more frequently:

> President William J. Clinton made 139 recess appointments, 95 to full-time positions. President George W. Bush made 171 recess appointments, of which 99 were to full-time positions. As of June 7, 2013, President Obama had made 32 recess appointments, all to full-time positions. [Hogue, "Recess Appointments" at 1.]

Until recently, these presidents and others before them generally have succeeded in a variety of efforts to shuffle their appointments through this constitutional backdoor, even if temporarily. On January 25, 2013, however, the United States Court of Appeals for the District of Columbia Circuit ruled against President Obama's effort to appoint three members of the five-member National Labor Relations Board ("NLRB")

without the advice and consent of the Senate. *See* Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013).

C. The Recess Appointment Exception to the Senate's Advice and Consent Power Is Specifically Defined and Limited by the Constitutional Text.

Rejecting the NLRB's invitation to adopt a practical interpretation of the President's recess appointment power in light of changed conditions, Judge Sentelle chose to employ a textual analysis, summarizing the court's holding, as follows:

> The power of a written constitution lies in its words. It is those words that were adopted by the people. When those words speak clearly, it is not up to us to depart from their meaning in favor of our own concept of efficiency, convenience, or facilitation of the functions of government. [*Id.*, 705 F.3d at 511-12.]

Relying on the Supreme Court's recent decision in the Second Amendment case of District of Columbia v. Heller, 554 U.S. 570 (2008), the court of appeals stated that "[w]hen interpreting a constitutional provision, we must look to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution." Canning, 705 F.3d at 500. As in Heller, the Canning opinion provides another opportunity for this Court to return to first principles of judicial review to which the courts, like the other two branches of government, are "bound" by the text of the Constitution as it was originally

written." See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-180 (1803).

At issue here is the meaning of Article II, Section 2, Clause 3, which reads:

> The President shall have Power to fill up all Vacancies that may **happen** during **the Recess** of the Senate, by granting Commissions which shall expire at the End of their next Session. [Emphasis added.]

The questions before the Court are transparently textual, requiring an exposition of the meaning of "recess" and "happen."

1. "The Recess."

The NLRB assumes that the word "recess" must be given its ordinary meaning — "a temporary suspension of a session, or a break within a session" — of the Senate. *See* Brief for Petitioner ("Pet. Br.") at 13-14. Thus, according to the term's ordinary meaning, it could be argued that the President may make a temporary appointment any time that the Senate is in recess. To be sure, this contention finds support in the "ordinary meaning rule [which] is the most fundamental semantic rule of interpretation[,] govern[ing] constitutions, statutes, rules, and private instruments." A. Scalia and B.A. Garner, Reading Law 69 (West: 2012). However, as these same commentators have acknowledged, citing Joseph Story's Commentaries, "[e]very word employed in the constitution is to be expounded in its plain, obvious,

and common sense, **unless** the context furnishes some ground to control, qualify, or enlarge it." *Id.* (Emphasis added.)

As Judge Sentelle noted, the word "recess" does not stand alone. It is preceded by the definite article, "the," giving rise to an inquiry whether there is a **specific** "recess" to which the text may be referring. Canning, 705 F.3d at 500. The first clue to the answer to this question is found in the recess appointment clause itself, which provides that any such appointment made by the President is temporary, expiring at "the end of [the Senate's] next session," thereby indicating (i) that the Senate meets in a period called a session and (ii) that there is more than one session in which any particular Senate assembles as a legislative body.

Indeed, Article I, Section 4, Clause 2 (i) mandates that "Congress assemble at least once in every Year," and as modified by the Twentieth Amendment, (ii) requires a biennial Congress[3] to meet in two separate and distinct assemblies, each beginning on January 3 of successive years. Each of these two annual assemblies are referred to by Article II, Section 2, clause 3 as a "session." Between the two sessions there is a recess, required by the Constitution, necessitating a suspension of business of the two houses of Congress. Unlike the "intrasession recesses," which are numerous and within the discretion of two Houses of Congress, the

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[3] The members of the House of Representatives and one-third of the Senate being subject to election every two years.

constitutionally prescribed annual "intersession recess" is singular and mandatory. Thus, "the recess" referred to in Article II, Section 2, Clause 3 is the "intersessional" break between the two Sessions mandated by Article I, Section 4, Clause 2.

The drafters of the Constitution insisted that the Congress meet at least once each year "as a check on the Executive department," thereby creating two sessions with one recess between them. *See* Records of the Convention, reprinted in 2 The Founders Constitution at 282-83 (item 3). As Story recounted in his Commentaries:

> Annual parliaments had been long a favorite opinion and practice with the people of England; and in America, under the colonial governments, they were justly deemed a great security of public liberty. The present provision (Article I, Section 4, Clause 2) could hardly be overlooked by a free people, jealous of their rights; and therefore the constitution fixed a constitutional period at which congress should assemble in every year.... Thus, the legislative discretion was necessarily bounded; and annual sessions were placed equally beyond the power of faction, and of party. [1 Story's Commentaries at §829.]

Unquestionably, "the recess" as it appears in Article II, Section 2, Clause 3 is not to be construed according to the ordinary meaning of the unmodified

"recess," but as a parliamentary "term[] of art"[4] describing the constitutionally-mandated recess between the constitutionally-required annual sessions of the Senate.

Further, as the court below noted, if the President could appoint officers whose appointment requires the Senate's advice and consent whenever the Senate was in "a recess," then the exception provided by the recess appointment clause "could easily swallow the 'general' route of advice and consent." Canning, 705 F.3d at 503. Indeed, such interpretation would run afoul of yet another canon — that in "expounding the Constitution ... every word must have its due force, and appropriate meaning...." *See* Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840).

2. "Happen."

According to Article II, Section 2, Clause 3, the President's unilateral recess appointment power extends to "all vacancies that may happen during the recess." According to Petitioner, this language should be construed to extend to any vacancy that exists during a recess, irrespective of when it arose. *See* Pet. Br. at 28-32. In response, Canning contends that the plain meaning of the phrase requires that the vacancy happen, or arise for the first time, during the recess. *See* Brief of Respondent Noel Canning at 7.

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[4] *See* Scalia and Garner, Reading Law at 73.

Unlike "the recess," the word, "happen," appears in the text without a modifier. When interpreted by itself, "happen" is a verb that ordinarily means "to take place," or "to occur." Unlike the meaning of "the recess," the meaning of "happen" is governed by the ordinary meaning canon. Consulting "[d]ictionaries at the time of the Constitution," the circuit court determined that "happen" meant to "fall out; to chance; to come to pass.'" *Id.* at 507. From this point, the court concluded that to "happen" within the meaning of the recess appointment exception, a vacancy must "first arise" during "the recess" between two or more sessions of the Senate, not at some previous time. *Id.* And rightfully so, for in context it appears that the power to make recess appointments is the exception, not the rule, and "happen" is used to limit that power to apply only to the circumstance when a vacancy first occurs in the recess between two annual sessions, not during some other period.

According to the fixed-meaning canon,[5] the definition of "happen" cannot be changed to adapt it to changing times. *See* Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the State of the American Union, 67 (Little Brown, 5th ed. 1883). ("A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable.")

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[5] *See* Scalia & Garner, Reading Law at 78. ("Although courts routinely apply legal instruments to novel situations over time, their meaning remains fixed.")

II. SENATE INACTION ON A PRESIDENT'S NOMINATIONS DOES NOT JUSTIFY THE UNILATERAL USE OF THE RECESS APPOINTMENT POWER.

A. The Constitution Does Not Mandate that Every Executive Office Must Be Filled at All Times.

Presidential pique at Senatorial prerogative can take different forms. In 1997, President Clinton announced William Lann Lee as "acting" Assistant Attorney General for Civil Rights, after the Senate Judiciary Committee had refused to confirm him in a recorded vote.[6] In a fit of Presidential frustration, President Clinton stated that "I have done my best to work with the United States Senate in an entirely constitutional way. But we had to get somebody into the Civil Rights Division." S. Duffield and J. Ho, "The (Still) Illegal Appointment of Bill Lann Lee," 3 TEX. REV. L. & POL. 402 (1998-1999) at 404. Then, in August of 2000, President Clinton again appointed Lee — still not having been confirmed — to the same office as a recess appointment. H. Hogue, "The Noel Canning Decision and Recess Appointments Made from 1981-2013," Congressional Research Service, Feb. 4, 2013, p. 18.

Petitioner's unstated premise in this case seems to be like that of President Clinton — that the President is somehow guaranteed the power to have vacant

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[6] "Clinton Makes Lee Acting Civil Rights Chief," CNN, Dec. 15, 1997, http://www.cnn.com/ALLPOLITICS/1997/12/15/lee/.

positions filled — and if the Senate will not assist him in confirming nominees, then the President should be able to do it himself. Petitioner cites a law review article for the proposition that "'[i]f the [P]resident needs to make an appointment ... *when* the vacancy arose hardly matters; the point is that it **must be filled now**.'" Petition for a Writ of Certiorari ("Pet. Cert.") at 26 (emphasis added). Petitioner argues that the circuit court's opinion "threatens a significant disruption of the federal government's operations...." Pet. Cert. at 30.

But nowhere does the Constitution say that appointees "**must**" be confirmed by the Senate. On the contrary, the Constitution gives the Senate the **discretionary** power to advise and consent to such nominations. The Constitution does not require that power to be exercised. Of course, a President could almost always fill a vacancy quickly — so long as he picks a person that the Senate will confirm, even if not his ideal choice.

If the Constitution intended to guarantee the President a full roster of confirmed nominees, it would not have given the Senate such a broad power over "advice-and-consent" — including the power not to exercise that power through a vote. Although positions might sit empty for some period of time, and though such a result might seem to some to be inefficient or less-than-optimal, the text and structure of the Constitution has granted to the Senate the prerogative to say no.

B. The NLRB Unilateral Intrasession Appointments Were Not Necessary.

Petitioner argues practicalities — that the President must have unilateral intrasession appointment powers, or else there will be "periods of potentially significant duration in which there is no power to fill vacant offices, not even temporarily...." Pet. Cert. at 16. This is a *non-sequitur*. Intrasession adjournments do not, as Petitioner claims, represent times that "the Senate is unavailable to give its advice and consent." Pet. Cert. at 23.

On a date when the Senate was not actually in recess, President Obama made three recess appointments to the NLRB. Only one appointment was necessary to give the NLRB a quorum to do business. Only one of those vacancies, that of Sharon Block, actually occurred during the alleged recess.[7] The other two vacancies, filled by Terence F. Flynn and Richard F. Griffin, had become vacant long before, on August 27, 2010 and August 27, 2011. *Id.*

Moreover, the President had already nominated both Flynn and Griffin to the NLRB more than four months before he made the appointments in question.[8] The Senate had not confirmed these nominees, due to

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[7] As the circuit court notes, "Sharon Block ... filled a seat that became vacant on January 3, 2012...." Canning, 705 F.3d at 498.

[8] http://www.whitehouse.gov/the-press-office/2011/12/15/presidential-nominations-and-withdrawal-sent-senate.

Republican opposition.[9] This political resistance may have caused the Executive some consternation, but it was not a justification to ignore constitutional procedure.

It is not as if the Senate was unaware that the President had made nominations that he wished to be confirmed. Nor was the Senate unaware that it would adjourn for the holidays. The Senate could have chosen to confirm the President's nominations at any time, but it did not do so. Since the Senate did not act on at least two NLRB appointments for months before it adjourned, nothing would be changed by the Senate continuing inaction until it reconvened after the holidays. That was a deliberate choice, not simply an oversight.

The recess appointments power is a constitutional check and balance on the power of the Executive Branch. The President, then, should not be surprised if his appointments power is occasionally checked, as it was here. This case represents the exercise of gamesmanship to thwart political opponents through the illegitimate usurpation of legislative power by the Executive. Only belatedly has this maneuver been defended as a proper exercise of a constitutional power.

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[9] E. Pianin and B. Ehley, "Here's Who Loses in the Filibuster Fight," The Fiscal Times, July 15, 2013, http://www.thefiscaltimes.com/Articles/2013/07/15/Heres-Who-Loses-in-the-Filibuster-Fight. ("But when [the Republicans] have withheld confirmation, it has been for agencies that many of them would prefer to neuter, dismantle, or eliminate.")

C. The Senate's Inaction Here Does Not Open the Door to De Facto Repeal of Article II, Section 2, Clause 5.

In the leading court of appeals decision upholding a broad recess appointment power, Judge Barkett, writing in dissent in Evans v. U.S., 387 F.3d 1220 (11th Cir. 2004), stated that the recess appointments power was for "when the Senate is disabled from acting upon appointments." *Id.*, 387 F.3d at 1232 (Barkett, dissenting). Judge Barkett notes that nowhere is it suggested that "the clause was added to allow the President to appoint someone whom the Senate might refuse to confirm." *Id.* at 1232. This is in line with the circuit court's opinion here, that the President has limited power "when the Senate is by definition not in session and therefore unavailable to receive and act upon nominations from the President." *Id.* 705 F.3d at 499. The recess power "served only as a stopgap for times when the Senate was unable to provide advice and consent." *Id.* at 502. To hold otherwise would be to "allow[] the President to side-step the Senate's advice-and-consent role even where the Senate is not disabled from fulfilling that role...." Evans, 387 F.3d at 1234.

The scenario laid out by Judge Barkett is exactly what happened in this case. The Senate had not confirmed (and likely would have continued to refuse to confirm) the President's nominees. Nevertheless, the President proceeded to appoint them unilaterally. However, by not approving, indeed not even holding a vote on the President's nominees, the Senate had in effect acted. Although the Senate had not formally

voted "yes" or "no," inaction constituted a deliberate choice. As former Library of Congress Senior Specialist in Separation of Powers Louis Fisher explained, citing examples drawn from the administrations of Presidents Ford, Carter, Reagan, Bush, and Clinton, "[t]he mere fact that the President submits a name for consideration does not obligate the Senate to act promptly." L. Fischer, Constitutional Conflicts between Congress and the President, 5th edt., U. Press of Kansas (2007), at 26.

In using a filibuster or threat thereof to hold up a vote, the minority party in the Senate was inviting more acceptable candidates. Contrary to what Petitioner would have this Court believe, this is precisely the process the Constitution intended.

Article I, Section 5, Clause 2 states that "[e]ach House may determine the Rules of its Proceedings." The Senate has done just that in setting forth the rules for the confirmation proceedings, and it is not up to the Executive to bypass those rules when they become inconvenient.[10]

To be sure, a president's effort to make a particular appointment can be frustrated by the

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[10] In fact, in this case the President later withdrew both the Griffin and Block nominations, and made two other nominations to replace them. http://www.politico.com/story/2013/07/white-house-consults- with-afl-cio-head-on-nlrb-picks-94280.html. The Senate then ratified both members, who currently hold their offices pursuant to proper constitutional process. *See* http://www.nlrb.gov/who-we-are/board/nancy-j-schiffer; *see also* http://www.nlrb.gov/who-we-are/board/kent-y-hirozawa.

inaction of Congress. But inaction can serve a legitimate purpose in the advise and consent process. Indeed, failure to vote on a nominee has the same effect as voting down an appointee, but without the same stigma. If the President were empowered to bypass Congress during any period of recess, then it would be the President who sets the Senate agenda, not the Senate, and this would undermine the constitutional object of checking the President's power of appointment. If the President were free to seize upon any time when the Senate is in recess in which to make a controversial appointment that "happened" at any prior date, then the Senate's constitutional role would be thwarted.

Petitioner argues that the Senate has "acquiesced" to Presidents' usurpation of its power over appointments. Pet. Cert. at 18. Petitioner claims that there is "evidence of Congress's acquiescence in the Executive's interpretation and practice...." Pet. Cert. at 28. However, fact that the Senate has kept silent on this issue does not mean it has acquiesced.

Rather, the **minority** party was able to prevent the whole body from voting on the President's nominations. Surely, the **majority** party of the Senate — which would have approved the President's nomination — would have every reason **not** to object to the President's illegitimate use of power to thwart the minority's legitimate use of power permitted by the Senate's rules.[11]

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[11] As for the future, on November 21, 2013, the Senate Democrats exercised the so-called "nuclear option" to amend its rules and

III. THE APPOINTMENTS POWER DISPUTE IN THIS CASE MUST BE VIEWED AS AN IMPORTANT BATTLE IN THE WAR THAT HAS BEEN WAGED BY PRESIDENTS TO USURP LEGISLATIVE POWERS, PUTTING AT RISK THE LIBERTIES OF THE PEOPLE.

While the appointments power issue in dispute in this case has the appearance of an internecine battle between the political branches of government, it is much more than that. Allowing the President to fill senior government positions with persons deemed unqualified by the Senate puts Americans at the very real risk of being subjected to an unchecked power of a President — the very definition of what the founders called "arbitrary power."[12] The appointments process is an essential component of our constitutional republic's structure, designed to protect the individual from the exercise of power emanating from the wishes of one man. As the court of appeals explained:

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eliminate the possibility of filibuster on certain presidential nominations. P. Kane, "Reid, Democrats trigger 'nuclear' option; eliminate most filibusters on nominees" (Nov. 21, 2013), http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.

[12] *See, e.g.*, Luther Martin, "Report to the Maryland Legislature," reprinted in R Yates and J. Lansing," Secret Proceedings and Debates of the Federal Convention (U. Press of the Pacific, 2002), pp. 81, 83.

> The Constitution's separation of powers features, of which the Appointments Clause is one, do not simply protect one branch from another..... These structural provisions serve to protect the *people*, for it is ultimately the people's rights that suffer when one branch encroaches on another. [Canning, 705 F.3d at 510.]

In this case, among the many Americans protected by the Constitution's appointments structure was Mr. Canning, who has suffered from the exercise of arbitrary power from an administrative agency neither constituted, nor acting, according to law.

As the court of appeals explained, the "appointments structure" is not a peripheral issue, but one which "forms a major part of the separation of powers in the Constitution...." Canning, 705 F.3d at 504. Indeed, the appointments dispute to be resolved here is an important component of an ongoing battle by Congress to defend itself against presidential forays in pursuit of political dominance. As such, the three recess appointments to the NLRB by President Obama under review here must be viewed in context — not just vis-a-vis earlier presidential exercises of the recess appointment power, but also in the light of other similar and ongoing presidential efforts to assume power at the expense of Congress, and to the derogation of the rights of the American people.

There is no argument from necessity requiring the Senate's consent to vital executive posts to somehow justify the overthrow of constitutional order. Despite

each President's complaints about Senate cooperation on appointments, the numbers do not support the contention. "In the 111th Congress, for example, the President submitted 964 nominations to executive branch positions, and 843 of those were eventually confirmed for an 87% success rate." M. Carey, "Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress" (Oct. 9, 2012), p. 3. Congress has cooperated in other ways as well. On August 10, 2012, the President signed P.L. 112-166, the Presidential Appointment Efficiency and Streamlining Act of 2011, removing the requirement for Senate "advice and consent" on nominations to 163 positions in the executive branch. However, there still remain as many as 1,200 senior positions in the executive branch requiring Senate Confirmation.[13] The Senate's constitutional role in this process must be protected.

A. The Senate's Role of "Advice And Consent" is Among its Most Important Prerogatives.

Senators fully understand the importance of, and highly value their role to advise and consent in the nomination of federal officials. Every Republican member of the U.S. Senate joined an *amicus curiae* brief filed with this Court in support of granting *certiorari*, even though they believed that the case was rightly decided by the court of appeals below. The Senate *amici curiae* explained their interest as follows:

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[13] M. Carey, "Presidential Appointments" at 7.

> As members of the Senate, *amici* have an unparalleled interest in safeguarding the chamber's constitutionally prescribed role in the appointments process, which the Executive here sought to circumvent. Particularly given Senate rules and practices providing members of the minority party a meaningful role in the chamber's consideration of appointments, *amici* have a powerful stake in ensuring that the Executive's assertion of a unilateral power to appoint federal officers—which the Framers deliberately withheld—is repudiated. [Brief of Senate Republican Leader Mitch McConnell and 44 other Members of the United States Senate, p. 1.]

None of the 53 Senate Democrats — and neither of the two Senators who serve as Independents but who caucus with the Democrats — joined in this or any other *amicus* brief at the petition stage. This is not at all surprising, given that the President making the appointment is a Democrat. Indeed, it is not inconceivable that, if a Republican President had made the recess appointments herein, a similar brief would have been filed by all of the Democratic Senators, and no Republican Senators. As Justice Jackson explained, it is entirely natural that the opinions of many "suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant." Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, R., concurring). Although the Republican Senators' *amicus* brief reflects the high value that

Senators generally place on their important role in the appointment process, that brief limited itself to the constitutional argument, providing no insight as to why the Senate so highly prizes its prerogatives.

However, Senators well understand how to employ effectively their special constitutional role in the appointment process well before the President nominates — considering it their prerogative to suggest suitable persons to the executive, as part of the "advice" function. The motivation of Senators may vary, with some seeking patronage, or the advancement of their friends and political supporters, or simply the promotion of those who they believe will do a good job for the President. One common desire is to have appointed an officer who will give special emphasis to a particular Senator's agenda.

Nominations are referred to one of the Senate's 20 standing committees,[14] based on each committee's jurisdiction, allowing all 100 Senators to have a meaningful, personal role in the appointment of officials in their areas of responsibility.[15] Appointees are required to fill out detailed questionnaires as to their background, and respond at a hearing and in

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[14] *See* Senate Rule XXXI, http://www.rules.senate.gov/public/index.cfm?p=RuleXXXI. *See also* http://www.senate.gov/pagelayout/committees/d_three_sections_with_teasers/committees_home.htm.

[15] The Senate's website tracks the current nominations being considered by the Senate's various committees. *See* http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/nom_cmtec.htm.

writing to questions posed by Senators. With respect to appointees who are viewed as unqualified by education, experience, or viewpoint, the confirmation process allows the development of a record, a forum for public attention to be focused on the appointment, and a way to wage an effort to block the nomination.[16]

The confirmation process provides Senators with the opportunity to meet personally with the nominee when they are in a position of strength. Senators can seek commitments from the appointee, for example, that certain information will be provided to the Senators, which had been previously withheld from Congress.[17] Senators can urge that their staff

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[16] Ironically, it is Vice President Biden who is credited with developing many of the Senatorial tactics to thwart Presidential nominees during his 27 years in that body. P. Winn, "Conservatives Blast Biden for Role in Bork and Thomas Hearings," CNSnews.com (Aug. 27, 2008). http://cnsnews.com/news/article/conservatives-blast-biden-role-bork-and-thomas-hearings.

[17] Congress continues to have a surprisingly difficult time obtaining important documents from the Executive Branch. Even where the receipt of information is necessary to the legislative process, the withholding of documentation from Congress can be part of a congressional relations strategy. One illustration involves managing congressional review of a totalization agreement — a Social Security treaty negotiated by the Social Security Administration, which would become law in the absence of a resolution of disapproval by at least one House of Congress within 60 legislative days after approval by the President and submission to Congress in accordance with 42 U.S.C. § 433(e)(2). The U.S.-Mexico Totalization Agreement was signed by the Social Security Administration in 2004, but still has not been submitted to Congress, which, like the public, had been kept substantially in

members, or persons from their State, be hired by the agency. And, importantly, Senators can use these meetings to obtain assurances to promote or oppose specific programs administered by the agency in question. *See generally*, L. Fisher, Constitutional Conflicts at 21-47.

The advice and consent role constitutionally-assigned to the Senate is especially applicable to those presidential nominees who have discretionary powers that, if not properly exercised, would intrude upon liberties secured to the people by the Bill of Rights. Of particular interest to two amici — Gun Owners of America, Inc. and Gun Owners Foundation — is the Second Amendment right to keep and bear arms. Under the current administration, as well as other administrations in the recent past, presidents have bypassed Congress, unconstitutionally threatening such rights by executive orders and actions. Such unilateral claims of executive power in the highly controversial area of gun control, if not checked by the advice and consent power of Senate, would open the door to the appointment of ATF and other Justice Department officials who, even though serving temporarily, could misuse their regulatory and administrative powers to lay the foundation for programs such as a national registration of gun

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the dark. Only the efforts of a nonprofit organization, The Senior Citizens League, through a Freedom of Information Act suit caused the signed Agreement to enter the public domain, thereby also being provided to Congress. *See* http://judiciary.house.gov/hearings/printers/110th/36174.PDF (remarks of Rep. Steve King (R-IA) at 48).

owners, or even the confiscation of the people's weapons and ammunition.

Should the constitutional structure by which appointments are made now be negated by judicial fiat, the President would have gained almost unlimited latitude to appoint persons of his own choosing to senior government positions, (i) radically altering the balance of power between the President and the Senate, and (ii) inexorably moving the country to a modern version of monarch of the sort sought after by a distinct minority of the Founders, but opposed by the American people.[18]

B. Presidential Efforts to Usurp Legislative Power Are a Continuing Threat to Constitutional Separation of Powers.

Article I, Section 1 of the Constitution provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States...." As Justice Jackson cogently summarized: "The Executive, except for recommendation and veto, has no legislative power."[19] Youngstown Sheet & Tube, 343 U.S. at 565.

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[18] *See generally*, Thomas DiLorenzo, Hamilton's Curse, Crown Forum (2008), pp. 185-87; Luther Martin, "Report," pp. 13-15. The desire of a people to be ruled over by a king would appear to be deeply rooted in the nature of man. *See* I Samuel 8:5.

[19] Article II, Section 3 of the U.S. Constitution sets out the President's duty to "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient...." The only additional Presidential power which even

Yet, over time, and in different ways, the executive has assumed a greater and greater legislative function, so that it is now difficult to contend that all legislative power is truly "vested" in the Congress. The illustrations are legion.

- President Theodore Roosevelt embraced what has come to be known as the "Trusteeship theory" of the Presidency.[20]

- In his first inaugural address, President Franklin D. Roosevelt warned Congress that if it did not grant him the powers he sought, he would exercise them anyway.[21]

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touches on the legislative power is his authority, "on extraordinary Occasions, [to] convene both Houses, or either of them, and in the Case of Disagreement between them, with Respect to the Time of Adjournment ... may adjourn them to such Time as he shall think proper...." Article I, Section 3.

[20] President Theodore Roosevelt explained: "I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws." Theodore Roosevelt, An Autobiography (New York: Scribner, 1926), pp. 185-86.

[21] "It is to be hoped that the normal balance of executive and legislative authority may be wholly adequate to meet the unprecedented task before us. But it may be that an unprecedented demand and need for undelayed action may call for temporary departure from that normal balance of public procedure. I am prepared under my constitutional duty to recommend the measures that a stricken Nation in the midst of

- In one of his weekly radio addresses, President William J. Clinton issued a warning to Congress that if it did not act on a particular matter, he would.[22]

- Presidents have exercised legislative authority through the use of various types of presidential directives, generally, Executive Orders.[23]

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a stricken world may require. But in the event that the Congress shall fail to take one of these two courses, and in the event that the national emergency is still critical, I shall not evade the clear course of duty that will then confront me." Franklin D. Roosevelt, "First Inaugural Address" (Mar. 4, 1933).

[22] "Congress has a choice to make in writing this chapter of our history. It can choose partisanship, or it can choose progress. Congress must decide ... I have a continuing obligation to act, to use the authority of the presidency, and the persuasive power of the podium to advance America's interest at home and abroad." W.J. Clinton, "Clinton Says He Will Use 'Authority of the Presidency' to Press Agenda," White House Bulletin, July 6, 1998. One of the ways that President Clinton acted was Executive Order 12954 (Mar. 8, 1995), to overturn a 1938 U.S. Supreme Court decision regarding permanent striker replacements. Since Congress had rejected corrective legislation, President Clinton acted, leading to the second time that an Executive Order was struck down, this time by the U.S. Court of Appeals for the D.C. Circuit.

[23] *See generally* J. Carey & M. Shugart, Executive Decree Authority, Cambridge University Press (1998), Chapter 9; W. Olson & A. Woll, "Executive Orders and National Emergencies: How Presidents Have Come to Run the Country by Usurping Legislative Power," Cato Policy Analysis No. 358 (Oct. 28, 1999). http://www.cato.org/pubs/pas/ pa-358es.html; K. Mayer, With the Stroke of A Pen: Executive Orders and Presidential Power, Princeton U. Press (2001); P. Cooper, By Order of the President:

- This Court has sanctioned the *de facto* repeal of the long-recognized Nondelegation Doctrine, permitting the nearly unbridled growth of the Administrative State.[24]

- Relying on their role as Commander in Chief, Presidents of both parties have come to view their authority, particularly during war time, to be nearly unlimited.[25]

- Presidents seek to set the entire legislative agenda for each fiscal year, beginning with the submission of a comprehensive proposed budget for each fiscal year and highlighted by the State of the Union address.[26]

The Use & Abuse of Executive Direct Action, U. Press of Kansas (2002).

[24] This Court's most recent discussion of the vanishing nondelegation doctrine, in Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001), permits delegation of legislative power so long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *Id.*, at 472 (citation omitted).

[25] *See, e.g.*, J. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them," Memorandum Opinion for the Deputy Counsel to the President (Sept. 25, 2001). http://www.justice.gov/olc/warpowers925.htm

[26] The President's Budget for Fiscal Year 2014 seeks to set the priorities for the nation. This comprehensive plan for spending and taxing is submitted to Congress, and can only be described as massive. The Government Printing Office sells the four basic

Indeed, Members of Congress have grown so accustomed to responding to Presidential legislative leadership that they actually blame the President when he fails to provide what they consider to be vigorous leadership for Congress.[27]

Even more surprising is that the President has not met more resistance in usurping legislative power, as often it has been unilaterally surrendered by Congress. Congress has granted the President vast, standby powers to act in ways which appear legislative in nature, such as the Presidential declaration of a "national emergency."[28] For example, after 9/11, Congress approved the "Authorization for Use of Military Force," 115 Stat 224 (Sept. 14, 2001) — a virtual delegation of the Congressional war-making power to the President, including the power to determine against whom the nation is at war, and when it would end. Thus, in a development which may well have been completely unanticipated by the

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printed budget documents for $245.00, including: the FY 2014 main Budget document; FY 2014 Budget Analytical Perspectives; FY 2014 Budget Historical Tables; and FY 2014 Budget Appendix; and a CD-ROM, delivered. http://bookstore.gpo.gov/catalog/budget-economy/federal-budgets-year/fiscal-year-2014-budget.

[27] *See, e.g.*, the criticism directed by Senator John Cornyn (R-TX) against President Obama for failure to lead Congress with respect to an increase in the debt limit and federal spending. Face the Nation (Oct. 6, 2013). http://www.metacafe.com/watch/cb-2aa7dll_Urft/cornyn_obama_awol_on_shutdown_debt_ceiling_debates/.

[28] *See generally*, D. Unger, The Emergency State: America's Pursuit of Absolute Security At All Costs, Penguin Press (2012).

Founders, Congress has failed to jealously guard its legislative prerogatives. However, of all of the powers vested in Congress, Senators of both parties have generally been mindful of the importance of protecting its prerogative to "advise and consent" to the appointment of important federal officials.

CONCLUSION

For the foregoing reasons, the opinion of the circuit court of appeals should be affirmed.

Respectfully submitted,

MICHAEL BOOS
CITIZENS UNITED
1006 Penn. Ave, SE
Washington, DC 20003
Attorney for Amici Curiae
Citizens United and
Citizens United Foundation

MICHAEL CONNELLY
U.S. JUSTICE FDN.
932 D Street, Ste. 2
Ramona, CA 92065
(760) 788-6624
Attorney for Amicus Curiae
U.S. Justice Foundation

WILLIAM J. OLSON*
HERBERT W. TITUS
ROBERT J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste.4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com

**Counsel of Record for Amici Curiae*
November 25, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

MAY 25 2013

No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE COALITION FOR A DEMOCRATIC WORKPLACE, AMERICAN HOTEL & LODGING ASSOCIATION, ASSOCIATED BUILDERS AND CONTRACTORS, INDEPENDENT ELECTRICAL CONTRACTORS, INTERNATIONAL FRANCHISE ASSOCIATION, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL COUNCIL OF CHAIN RESTAURANTS, NATIONAL RETAIL FEDERATION, RETAIL INDUSTRY LEADERS ASSOCIATION, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING

DEBORAH R. WHITE
Retail Industry Leaders Association
1700 N. Moore Street
Suite 2250
Arlington, VA 22209
(703) 600-2067
deborah.white@rila.org

MARK T. STANCIL
Counsel of Record
WILLIAM J. TRUNK
SARAH W. CARROLL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500
mstancil@robbinsrussell.com

Counsel for Amici Curiae

Library of Congress
Law Library

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BRIEF OF THE COALITION FOR A DEMOCRATIC WORKPLACE, AMERICAN HOTEL & LODGING ASSOCIATION, ASSOCIATED BUILDERS AND CONTRACTORS, INDEPENDENT ELECTRICAL CONTRACTORS, INTERNATIONAL FRANCHISE ASSOCIATION, INTERNATIONAL FOODSERVICE DISTRIBUTORS ASSOCIATION, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, NATIONAL COUNCIL OF CHAIN RESTAURANTS, NATIONAL RETAIL FEDERATION, RETAIL INDUSTRY LEADERS ASSOCIATION, AND SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING

INTEREST OF *AMICI CURIAE*[1]

The Coalition for a Democratic Workplace ("CDW") comprises more than 600 member organizations representing millions of employers nationwide. An important function of CDW is to provide a collective voice to its membership on issues of national concern to the business community. CDW regularly advocates for its members on a range

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[1] Petitioner and respondents have filed blanket letters of consent to the participation of *amici curiae*. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to this brief's preparation or submission. See S. Ct. Rule 37.6.

of labor issues and files *amicus curiae* briefs in cases of particular importance to its members.

The American Hotel & Lodging Association ("AH&LA") is the only national trade association representing all segments of the lodging industry. AH&LA serves the lodging industry by providing representation at the national level and in government affairs, education, research, and communications. AH&LA also represents the interests of its members in litigation raising issues of widespread concern to the lodging industry.

Associated Builders and Contractors ("ABC") is a trade association representing 22,000 construction and industry-related firms. ABC and its seventy chapters help members win work and deliver that work safely, ethically, and profitably for the betterment of their communities. ABC member contractors employ workers whose training and experience span all of the twenty-plus skilled trades that make up the construction industry.

Established in 1957, the Independent Electrical Contractors ("IEC") is a trade association representing 3,000 members with fifty-six chapters nationwide. Headquartered in Alexandria, Virginia, IEC is the nation's premier trade association representing America's independent electrical and systems contractors.

The International Franchise Association ("IFA") is the world's oldest and largest organization representing franchising worldwide. IFA works through its government relations and public policy, media relations, and educational programs to protect, enhance, and promote franchising. IFA members include franchise companies in more than

300 different business format categories, individual franchisees, and companies that support the industry in marketing, law, and business development.

The International Foodservice Distributors Association ("IFDA") is the trade organization representing more than 153 members in the foodservice distribution industry. IFDA members operate more than 700 distribution facilities in all fifty States across the United States with annual sales of more than $110 billion. These companies help make the food-away-from-home industry possible, delivering food and other related products to restaurants, institutions, and other foodservice providers.

The National Association of Wholesaler-Distributors ("NAW") is composed of direct member companies and a federation of national, regional, state, and local associations and their member firms which collectively total approximately 40,000 companies with locations in every State in the United States. NAW members are a constituency at the core of our economy – the link in the marketing chain between manufacturers and retailers as well as commercial, institutional, and governmental end users.

The National Council of Chain Restaurants ("NCCR") is the nation's leading trade association for chain restaurant businesses and a division of the National Retail Federation, the world's largest retail trade group. NCCR's members include large national and regional chain restaurant brands, many of which consist of local multi-unit operators and franchisees. NCCR advocates sound public policy on behalf of chain restaurant operators and regularly

takes particular interest in court cases, like this one, that affect the business operations of its members.

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all types and sizes, as well as restaurants and industry partners from the United States and forty-five countries abroad. In the United States, the NRF represents the breadth and diversity of an industry operating more than 3.6 million establishments that support one in four jobs, or 42 million working Americans.

The Retail Industry Leaders Association ("RILA") is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturer facilities, and distribution centers domestically and abroad.

The Society for Human Resource Management ("SHRM") is the world's largest association devoted to human resource management. Representing more than 250,000 members in more than 140 countries, SHRM serves the needs of human resources professionals and advances the interests of the human resources profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India, and the United Arab Emirates.

Because many of *amici*'s members are subject to the National Labor Relations Act ("NLRA"), *amici* have an interest in ensuring that the National Labor

Relations Board (the "Board" or "petitioner") does not issue binding decisions affecting thousands upon thousands of employers without a lawfully constituted quorum.

The court of appeals correctly held that the Board lacked a quorum because three of its five members were unlawfully appointed without the Senate's constitutionally required advice and consent. *Amici* respectfully submit this brief to underscore how unprecedented those appointments were and to explain why the government's sweeping view of the Recess Appointments Clause is unworkable and wrong. *Amici* agree with respondent Noel Canning that the Recess Appointments Clause, as originally and best understood, contemplates neither intra-session recess appointments nor appointments to fill pre-existing vacancies. However, this brief focuses more narrowly on the third question presented in this case and explains why the Constitution does not permit the President to exercise his recess-appointment power when the Senate is convening every three days in pro forma sessions.

STATEMENT

1. The Appointments Clause requires the President to obtain the advice and consent of the Senate before appointing high-ranking public officials. U.S. Const. art. II, § 2, cl. 2. This advice-and-consent requirement places an important constraint on the President's appointment power. The Framers understood that the Senate would be "an excellent check upon a spirit of favoritism in the President." The Federalist No. 76 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), at 513.

The Recess Appointments Clause immediately follows the Appointments Clause and allows the President "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. The recess-appointment power was intended as an "auxiliary method of appointment" in times of genuine necessity. The Federalist No. 67, *supra*, at 455. At the time of the Framing, Congress would often recess for six to nine months at a time, and the Framers understood that important vacancies could occur while the Senate was away. The President therefore was given the power to fill those vacancies "which it might be necessary for the public service to fill without delay." *Ibid.*

2. This case arises from the President's invocation of the Recess Appointments Clause to appoint three members to the Board on January 4, 2012, without the Senate's advice and consent.

Under the NLRA, the Board is to "consist of five . . . members, appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a). By statute, the Board must have three validly appointed members to have a quorum. *Id.* § 153(b). In the absence of a quorum, the Board is powerless to act. *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635, 2644-45 (2010).

On January 3, 2012, the first session of the 112th Congress came to a close. At that time, the commission of one of the Board's members – Craig Becker, a prior recess appointee – expired automatically. The resulting vacancy left the Board with only two members, and thus no quorum.

The next day, the President announced that he "refuse[d] to take 'no' for an answer" from Congress in connection with this and other vacancies. See Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1. The President declared that he was relying on the recess-appointment power unilaterally to appoint Sharon Block, Terence Flynn, and Richard Griffin to the Board. *Ibid.*[2]

The Senate was regularly holding sessions at the time. Between December 17, 2011, and January 23, 2012, the Senate was convening "pro forma"[3] every three days to satisfy its constitutional obligation not to adjourn for more than three days without the consent of the House of Representatives. See U.S. Const. art. I, § 5, cl. 4 (Adjournments Clause). Indeed, on January 3, 2012 – the day before the President made the appointments – the Senate assembled in that fashion to commence the second session of the 112th Congress, pursuant to the Twentieth Amendment. See 158 Cong. Rec. S1-01 (daily ed. Jan. 3, 2012).[4]

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[2] The President appointed Richard Cordray to the Consumer Financial Protection Bureau at the same time. Press Release, Office of the Press Secretary, The White House, President Obama Announces Recess Appointments to Key Administration Posts (Jan. 4, 2012).

[3] "Pro forma," in congressional parlance, generally refers to a session of brief duration convened principally to comply with the Adjournments Clause. "[T]he term pro forma describes the reason for holding the session, [but] does not distinguish the nature of the session itself. . . [A] pro forma session is not materially different from other Senate sessions." 158 Cong. Rec. S5954 (daily ed. Aug. 2, 2012) (CRS report).

[4] The Twentieth Amendment requires that "[t]he Congress shall assemble at least once in every year, and such meeting shall

The Senate's December 17, 2011, scheduling order contemplated that there would be "no business conducted" at these pro forma sessions. 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011). But the Senate did, in fact, conduct business during these sessions: On December 23, 2011, at the President's request, the Senate passed a bill extending the payroll tax cut for two months. *Id.* at S8789 (daily ed. Dec. 23, 2011).

On January 12, 2012, the Office of Legal Counsel issued an opinion declaring that the President's recess appointments were legally defensible. See *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. 1 (2012) ("OLC Opinion"). The OLC Opinion argued, in principal part, that the President possesses the unilateral power to judge the existence *vel non* of a "real and genuine recess." See *id.* at 5. Thus, notwithstanding the Senate's pro forma sessions, the President could "properly conclude that the Senate [was] unavailable" – and make recess appointments on that basis. *Id.* at 9.

3. On February 8, 2012, the newly constituted Board issued a decision adverse to respondent Noel Canning. Noel Canning petitioned for review of that decision in the United States Court of Appeals for the D.C. Circuit. Noel Canning argued, among other things, that the President's January 4 appointments were unconstitutional because the Senate was not actually in recess when the President purported to exercise his recess-appointment power. Resp. C.A. Br. 29-36. Accordingly, Noel Canning explained, the

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begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const. amend. XX, § 2.

Board lacked a quorum of validly appointed members and its order therefore lacked the force of law.

The court of appeals granted the petition and vacated the Board's order. Pet. App. 1a-55a. The court held that the January 4 appointments were unconstitutional for two reasons. *First*, a unanimous court held that the Recess Appointments Clause allows the President to make recess appointments only during the "inter-session" recess between two sessions of Congress.[5] *Second*, a two-judge majority further held that the Recess Appointments Clause extends only to those vacancies that actually "happen," or arise, during the recess in which appointments are to be made.

Because the appointments failed on those grounds, the court of appeals did not squarely address the narrower (and equally dispositive) question whether the President may lawfully make intra-session recess appointments where, as here, the Senate is convening every three days in accordance with the Adjournments Clause. In granting the Board's petition for certiorari, the Court directed the parties to brief and argue that question. See *NLRB* v. *Noel Canning*, 133 S. Ct. 2861 (2013).

SUMMARY OF ARGUMENT

The court of appeals correctly held that the President acted beyond his constitutional authority when he appointed Members Block, Flynn, and

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[5] The Third and Fourth Circuits have since joined the D.C. Circuit in holding that the Recess Appointments Clause does not countenance intra-session recess appointments. See *NLRB* v. *Enterprise Leasing Co. Se.*, 722 F.3d 609 (4th Cir. 2013); *NLRB* v. *New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013).

Griffin to the Board on January 4, 2012. The Recess Appointments Clause allows the President to fill only those vacancies that arise in recesses between – not during – Senate sessions. Even if the Court were to disagree, the January 4 appointments fail on a more basic level: Because the Senate was regularly holding sessions in January 2012, it was not in *any* form of recess – intra-session or otherwise – when the President purported to exert his recess-appointment power.

The January 4 appointments were quite literally unprecedented. To our knowledge, no President in history has attempted an intra-session recess appointment during such a brief adjournment. This abrupt departure from historical practice conflicts with the purpose of the Recess Appointments Clause and is a serious encroachment on the Senate's advice-and-consent function.

What is worse, the government has consistently defended these appointments on the basis that the President has sole discretion to judge whether the Senate is "functionally" in recess – *even if it is regularly holding sessions*. This functional-recess approach is untenable. For one, it flouts the plain language and original intent of the Recess Appointments Clause. For another, it would afford the President virtually unchecked authority to define the scope of his own recess-appointment power. Such an unwarranted arrogation of power would undermine the careful balance struck by the Framers, for it cannot be left to one branch of government to define its own exceptions to another branch's oversight.

The government offers no colorable argument to the contrary. Its "functional" approach does not

promote inter-branch predictability – it demolishes it. The Senate's plenary power to determine the rules of its own procedures does not vanish simply because the President may deem those rules inconvenient. And the government's functional-recess theory is unmoored from any historical pillar; it is telling that no President – not one – has ever declared a Senate session a nullity in order to avoid the advice-and-consent requirement. In any event, the government's argument fails on its own terms, because the Senate's pro forma sessions are "real" sessions in which the Senate can, routinely does, and in this case *did* perform legislative functions. The judgment of the court of appeals should be affirmed.

ARGUMENT

Amici agree with respondent Noel Canning that the January 4 appointments were unlawful and that the court of appeals' judgment should be affirmed. The court of appeals correctly held that the Recess Appointments Clause, as originally and best understood, contemplates neither intra-session recess appointments nor appointments to fill pre-existing vacancies. But we will not retread that ground here. Rather, this brief focuses on the third question posed by the Court: whether the Recess Appointments Clause vests the Executive with implicit power to declare a functional "recess" when the Senate expressly *declines* to enter a recess and instead convenes every three days in pro forma sessions. The answer to that question is no. The President's disregard for these pro forma sessions – which are Senate sessions in every relevant sense – provides a clear, narrow, and dispositive ground upon which to affirm the judgment below.

A. The Senate Was Not In Recess On January 4, 2012

It has long been settled that the President may not make intra-session recess appointments unless, at a minimum, the Senate has "adjourn[ed] for more than three days" under the Adjournments Clause. See U.S. Const. art. I, § 5, cl. 4. The government concedes as much: "[T]he Executive has long understood that such short intra-session breaks – which do not genuinely render the Senate unavailable to provide advice and consent – are effectively *de minimis* and do not trigger the President's recess-appointment authority." Pet. Br. 18; see also OLC Opinion, *supra*, at 9 n.13.

This baseline principle has deep roots. Attorney General Daugherty – perhaps the most oft-cited authority for the practice of intra-session recess appointments – confirmed long ago that the Adjournments Clause is a structural constraint on the Recess Appointments Clause. See *Executive Power – Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921). He declared that if the Senate has not adjourned for more than three days, then "no one . . . would for a moment contend that the Senate is not in session." *Ibid.*

It is sensible to read these Clauses together, because they turn on the same basic fact of the Senate's availability. The Adjournments Clause was intended to prevent one house of Congress from unilaterally disabling itself (at the expense of the other) "without any regard to the situation of public exigencies." 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, at 368 (Jonathan Elliott ed., 2d ed. 1836) (Virginia convention) (remarks of James

Madison). Similarly, the Recess Appointments Clause – at a time of extended recesses and limited communication – guarded against "public inconveniences"[6] by allowing the President to fill vacancies that were "necessary for the public service to fill without delay." The Federalist No. 67, *supra*, at 455.

Because the Framers considered three-day breaks *de minimis* periods of congressional unavailability under the Adjournments Clause, the appointment-by-necessity rationale of the Recess Appointments Clause would likewise be out of place during such brief adjournments. See Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 419-21 (2005) (explaining why the Clauses should be read together). Even the United States has urged that it would make "eminent sense" to "apply the three-day rule explicitly set forth in the Adjournment Clause" in construing the Recess Appointments Clause. Reply Brief for Intervenor United States at 21, *Evans* v. *Stephens*, 407 F.3d 1272 (11th Cir. 2005) (en banc).[7] Similarly, this Court has employed the Adjournments Clause's three-day rule to construe other constitutional provisions that hinge on congressional availability. See *Wright* v. *United States*, 302 U.S. 583, 589-90 (1938) (Pocket Veto Clause).

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[6] See 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, at 135 (remarks of Archibald Maclaine).

[7] CDW pointed out this change in position in its *amicus curiae* brief in support of certiorari. See Br. of the Coalition for a Democratic Workplace as *Amicus Curiae* in Support of Certiorari at 10. The government has failed to explain (or even acknowledge) it.

Prior administrations have long hewn to this principle. To our knowledge, no President in history has attempted an intra-session recess appointment when the Senate has not adjourned for more than three days under the Adjournments Clause. In the last thirty years, the shortest intra-session recess during which a recess appointment was made was ten days. See Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions*, at 3 (2012).

Thus, although not squarely addressed by the court of appeals, the January 4 appointments were quite literally unprecedented. The Senate never obtained – did not even seek – the House's consent to adjourn for more than three days. As a consequence, the Senate was constitutionally required to (and did) convene every three days. When the appointments were made, the Senate was not in "recess" as that term has ever been understood. That should settle the matter.

B. The President May Not Unilaterally Declare A Session Of Congress To Be A "Functional" Recess

The government does not quarrel with much of the above. It concedes that, under any credible authority, a three-day break cannot trigger the President's recess-appointment power. See Pet. Br. 44-46. Nonetheless, the government contends that, despite convening every three days, the Senate was not *really* holding sessions at the time of the appointments. The government asks this Court to endorse a "functional" recess theory under which the President, applying abstract factors, can decide whether a Senate session bears sufficient

"hallmarks" of a recess such that the President may invoke his own appointment power. See *id.* at 47-51.

The court of appeals correctly rejected this breathtaking proposition, which is divorced from the constitutional text, lacks any meaningful limiting principle, and represents an abrupt departure from centuries of practice. See Pet App. 29a-30a. This Court should do likewise.

1. The Government's Functional-Recess Approach Is Flawed And Unworkable

The government advocates a "functional" approach to assessing whether a Senate session is actually a recess in disguise. Conspicuously absent from the government's brief is any discussion of *who* should possess this singular power to judge whether a "session" is really a "recess." But the assumption inherent in the government's brief, which it has made explicit elsewhere, is that the President's view of the matter is exclusive and inviolate. See OLC Opinion, *supra*, at 13 ("[T]he President may determine that pro forma sessions at which no business is to be conducted do not interrupt a Senate recess for purposes of the Recess Appointments Clause."). This view of the Recess Appointments Clause is untenable and wrong.

a. As a threshold matter, the government's functional-recess approach flouts the bright-line rule explained above: Any intra-session recess appointment requires, at a minimum, that the Senate adjourn for more than three days under the Adjournments Clause. The Senate never did that. Indeed, because the Senate never obtained the House's consent, it could not lawfully adjourn for more than three days. How could the Senate be in a

twenty-day recess when the Constitution commands that it *not* be?

The government offers two responses. *First*, it suggests that the "better view" is that pro forma sessions actually "do not comply with the Adjournment Clause." Pet. Br. 59-60. In other words, the Senate *did* adjourn for more than three days – it just did so unconstitutionally. *Id.* at 59-61. This argument is contradicted by more than a century of congressional practice. Congress has consistently and without challenge convened pro forma sessions to satisfy the Adjournments Clause since the 1850s. See, *e.g.*, Cong. Globe, 33rd Cong., 1st Sess. 1347 (June 8, 1854) (Senate resolution scheduling pro forma sessions); 5 Cong. Rec. 333, 337-38 (1876) (same); 71 Cong. Rec. 3045 at 3228-29 (1929) (House resolution scheduling pro forma sessions); 96 Cong. Rec. 16,980 (1950) (Senate resolution scheduling pro forma sessions); *ibid.* at 17,020 (1950) (same); *id.* at 17,022 (1950) (same); 98 Cong. Rec. 3998-99 (1952) (same); 126 Cong. Rec. 2574 (1980) (same); 127 Cong. Rec. 190 (1981) (same). This "[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).[8]

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[8] This should not be confused with the government's argument that historical practice supports its view of the Recess Appointments Clause. See Pet. Br. 21-28. Although intra-session recess appointments have occurred with some frequency in the last century, the practice was expressly disavowed by the Framers. See Pet. App. 20a-23a. The use of pro forma sessions does not have a similarly fractured history. There is no evidence that the Framers contemplated two types of sessions – some "real" for constitutional purposes, and others not.

The government points, however, to an 1876 Senate debate in which it claims that Senator Roscoe Conkling objected to the use of pro forma sessions to satisfy the Adjournments Clause. The government misreads the historical record. The original proposal, offered by Senator Henry Bowen Anthony, was to issue a single order that would prospectively specify all of the dates on which the Senate would convene over the holidays, each session three days after the last. See 5 Cong. Rec. 334 (1876). Senator Conkling objected to that approach, but his objection was resolved through a change that he himself described as "so very simple": instead of setting all of the dates prospectively, the Senate would "adjourn[] for three days with a general understanding among Senators that they are not to expect each other to attend at the next meeting and that at that time, there will be doubtless somebody here to move an adjournment from day to day." *Id.* at 336 (Sen. Conkling). This small change is hardly the grand repudiation of pro forma sessions that the government claims. See, *e.g.*, *ibid.* (Sen. Morrill) ("It seems to me that we are spending time upon a matter that we do not practically differ at all about."). In fact, rather than showing historical disapproval of pro forma sessions, the 1876 debate demonstrates just how deeply rooted they are.

Significantly, the Senate has also used pro forma sessions to satisfy the Twentieth Amendment, which requires that "Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January." U.S. Const. amend. XX, § 2. Congress has, on numerous occasions, convened pro forma to comply with that "assembl[y]" requirement. See H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (1979); H.R. Con. Res. 260, 102d Cong.,

105 Stat. 2446 (1991); 151 Cong. Rec. S14,421 (daily ed. Dec. 21, 2005); 153 Cong. Rec. S16,069 (daily ed. Dec. 19, 2007); 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). This practice has likewise gone unchallenged for decades, and even the OLC Opinion defending the lawfulness of the January 4 appointments acknowledged that the Senate's pro forma session on January 3, 2012, acted to "begin the second session of the 112th Congress." See OLC Opinion, *supra*, at 1. The Senate's longstanding use of pro forma sessions to "assemble" under the Twentieth Amendment is strong evidence that such sessions also satisfy the Adjournments Clause.[9]

Second, the government posits that a pro forma session might satisfy the Adjournments Clause, yet not interrupt a recess under the Recess Appointments Clause, because the Clauses serve different functions. Whereas the Adjournments Clause "is principally related to [the Senate's] internal matters," the government contends, "the Recess Appointments Clause . . . allocates power between the Senate and the Executive." Pet. Br. 60.

The government is wrong. For starters, this argument is circular: The government simply relies on one assumed conclusion (the Adjournments Clause concerns only Congress) to support another (the Adjournments Clause cannot affect the President's appointment power). In any event, the

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[9] Pro forma sessions are treated just like any other sessions for statutory purposes, as well. The Congressional Research Service has identified twenty-two statutes in which various time periods are computed based on days that Congress is "in session." 158 Cong. Rec. S5954-55 (daily ed. Aug. 2, 2012) (CRS report). Both the President and Congress take pro forma sessions into account when performing those calculations. *Ibid.*

argument requires one to accept that the Senate could be in "session" for one constitutional provision while simultaneously in "recess" for another. The Constitution supports no such dissonance. The Senate is either constitutionally available, or it isn't. There is no reason to presume that the Framers more abhorred unfilled vacancies than they did "the evils which might result from the want of a proper concert and good understanding between the houses." See 1 St. George Tucker, *Blackstone's Commentaries* Note D, at 206 (1803) (describing original intent of Adjournments Clause).

In short, the Senate has long used pro forma sessions to fulfill its constitutional mandate. See Noel Canning Br. at 52 and App'x B (providing an "illustrative list" of dozens of occasions on which the Senate has used pro forma sessions to satisfy its constitutional obligations between 1949 and 2013). Notwithstanding this, the government contends – for the first time, so far as we can tell – that pro forma sessions are shams. That is wrong as a constitutional matter and, unless one believes that the Senate (with the complicity of the House and the President) has been routinely violating the Adjournments Clause and the Twentieth Amendment, is squarely at odds with decades upon decades of historical practice.

b. The functional-recess approach is also dangerously unworkable. The Adjournments Clause has long stood as a bright-line limit on intra-session recess appointments. Casting aside that barrier would afford the President virtually unbounded authority to declare the Senate in recess. If the touchstone is simply whether *the President* concludes that the Senate, though holding sessions, is

"unavailable to perform its advise-and-consent function," OLC Opinion, *supra*, at 23, then nothing would preclude the President from declaring a de facto "recess" in any number of situations. Suppose, for example, that the Senate is engaged in lengthy debate or, in the President's view, simply taking too long to consider a nomination. Separation of powers principles do not evaporate in times of protracted political debate or even genuine impasse – to the contrary, that is often when such principles are most important.

The separation of powers "is a prophylactic device" that "establish[es] high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). The government's approach is barely a line in the sand. How robust must a session be to constitute a "real" session? Will thirty Senators for sixty minutes suffice? Sixty Senators for thirty minutes? What if all Senators are in attendance, but they take up little or no business? The government purports to offer some additional characteristics of a "functional" recess – no prayer or Pledge of Allegiance, for instance, see Pet. Br. 50 – but this ad hoc list, plainly tailored to the circumstances of this case, will prove unhelpful in future cases arising under different facts. More importantly, these disparate factors were created out of whole cloth and have nothing to do with the text or purpose of the Recess Appointments Clause. The Framers envisioned the recess-appointment power as "nothing more than a supplement" to the standard advice-and-consent method. The Federalist No. 67, *supra*, at 409. They surely did not intend for the President to pick and choose, on a case-by-case basis,

which characteristics (or lack thereof) render a legislative session sufficiently mundane to justify resort to that auxiliary appointment method.

The government claims that its functional approach is necessary to promote predictability. See Pet. Br. 51 (quoting *United States* v. *Smith*, 286 U.S. 6, 35-36 (1932), for the proposition that the President should not be subjected to the "'uncertainty and confusion'" of attempting to decipher Senate communications). But it is the government's approach that would breed uncertainty. If the difference between a "session" and a "recess" were a shifting landscape of multifactor tests crafted and applied by the President, then the Senate could never be certain whether its conduct might be taken as a sign of its "unavailability" – whether it was out of chambers for the weekend or for lunch, or even if it was "in session and [the President was] merely displeased with its inaction." Pet. App. 30a; cf. *Smith*, 286 U.S. at 35 ("It is essential to the orderly conduct of public business that formality be observed in the relations between different branches of the government charged with concurrent duties; and that *each branch* be able to rely upon definite and formal notice of action by another.") (emphasis added). There is no sufficient limiting principle to the government's position. The court of appeals rightly observed that the functional-recess test would "eviscerate the Constitution's separation of powers." Pet. App. 29a.

Not only that, but the government's approach is hopelessly backward-looking. It will never be clear *ex ante* whether the Senate has entered a "functional" recess because that determination depends on the nature and quality of sessions yet to

occur. The government relies on the assertion that "no work was done, no messages were laid before the Senate, and its members were dispersed" between January 3, 2012 and January 23, 2012, to justify recess appointments that were made on *January 4, 2012*. Pet. Br. 47. If the Senate *did* conduct business on January 5, 2012, could anyone dispute that the Senate was not in recess – even a "functional" one – for more than 48 hours? A bright-line approach grounded in the Adjournments Clause avoids such chaotic guesswork.

c. History and practice likewise militate against the government's position. As far as we can determine, no President has ever attempted an intra-session recess appointment unless the Senate has adjourned for more than three days with the House's consent. Such "prolonged reticence would be amazing if [the practice] were not understood to be constitutionally proscribed." *Plaut*, 514 U.S. at 230. In fact, only once in history has a President attempted an *inter*-session recess appointment under those circumstances. And that incident is a case study for why "high walls and clear distinctions," *id.* at 239 – not boundless executive discretion – are necessary in this area:

When the clock struck noon on December 7, 1903, President Theodore Roosevelt made 160 recess appointments during what he deemed a "constructive recess" in the few moments between the first and second sessions of the 58th Congress. See Hogue, *supra*, at 10. The tactic was widely condemned by Congress. In a 1905 report discussing the incident, the Senate Judiciary Committee lamented that "[t]he theory of 'constructive recess' constitutes a heavy draft upon the imagination." S. Rep. No. 4389, 58th

Cong., 3d Sess. 2 (1905), *reprinted in* 39 Cong. Rec. 3823 (1905). In words especially befitting the present case, the Committee admonished that

> the Framers [in drafting the Recess Appointments Clause] were providing against a real danger to the public interest, not an imaginary one. *They had in mind a period of time during which it would be harmful if an office were not filled; not a constructive, inferred, or imputed recess, as opposed to an actual one.*

Ibid. (emphasis added).

d. If there were any doubt whether the Senate was "really" in session, the benefit of that doubt lies firmly and exclusively with the Senate. The Constitution grants Congress plenary power to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Thus, this Court has confirmed that "all matters of method [of proceeding] are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just." *United States* v. *Ballin*, 144 U.S. 1, 5 (1892). Part and parcel of that power is the Senate's ability to "prescribe a method for . . . establishing the fact that the house is in a condition to transact business." *Id.* at 6; see Thomas Jefferson, Constitutionality of Residence Bill of 1790 (July 15, 1790), *reprinted in* 2 The Founders' Constitution, art. I, § 5, cl. 1-4, Doc. 14 (stating that "[e]ach house of Congress possesses this natural right of governing itself," including "fixing its own times and places of meeting").

Courts will not second-guess a determination by Congress that it has duly assembled. Even the judicial inquiry into whether a bill was lawfully

passed is a narrow one: if Congress says that it was, then that settles the matter. See *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 672 (1892). This principle is firmly grounded in the separation of powers and the "respect due to a coordinate branch of the government." *Id.* at 673. It would flout that principle for the President to cross-examine (and conclusively judge) whether the Senate is "functionally" in recess when that body declares itself to be in session.

The government protests that pro forma sessions should not receive such deference because, it claims, the Senate cannot disable the President from making recess appointments by falsely declaring itself in session when it is actually unable to fulfill its advice-and-consent function. See Pet Br. 61-63. Even if that were true, it is beside the point. Pro forma sessions are not the hollow exercises that the government portrays them to be. As explained below, the Senate *can* provide advice and consent during pro forma sessions, just as it can (and did here) fulfill other core legislative functions. Surely it is within the Senate's broad rulemaking power to declare itself in session at a time when it could, and proximate to this instance did, pass legislation.

More importantly, the power to consent necessarily includes the power to withhold consent. That the Senate declines to consent to a particular presidential nomination, or wishes to delay action on such nomination until it has had time to consider it in more depth,[10] does not mean that it is trampling

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[10] The President had nominated two of the three January 4 appointees only three weeks before he declared that he would not "take 'no' for an answer," *supra* p. 7, and purported to exercise his recess-appointment power. The Senate never had a

on the President's constitutional powers – it means that the Senate is exercising its own. The Framers intended for the Appointments Clause to engender negotiation, compromise, and shared responsibility between the President and the Senate. See *Edmond* v. *United States*, 520 U.S. 651, 660 (1997) ("By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one."). That the Senate does not promptly accede to the President's desired appointments is not the sign of a broken system; it is the hallmark of a system at work.[11]

The Recess Appointments Clause was "carefully devised" to not "in the slightest degree chang[e] the policy of the Constitution, that [] appointments are only to be made with the participation of the Senate." S. Rep. No. 4389, 58th Cong., 3d Sess. 2 (1905). The Senate can abrogate (or eliminate) the President's recess-appointment power by choosing to remain "perpetually in session . . . for the appointment of

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chance to give "no" for an answer. As of January 4, the Senate had not even received the nominees' committee questionnaires or their background checks. See Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, NLRB Recess Appointments Show Contempt for Small Businesses (Jan. 4, 2012).

[11] In fact, in July 2013 the Senate and President reached a compromise on the appointments at issue in this appeal. The Senate confirmed one of the January 4 recess appointees, Richard Cordray, as director of the Consumer Financial Protection Bureau and confirmed two nominees to the National Labor Relations Board. See Jonathan Weisman & Jennifer Steinhauer, *Senate Strikes Filibuster Deal, Ending Logjam on Nominees*, N.Y. TIMES, July 17, 2013, at A1.

officers." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1557, at 416 (3d ed. 1833). That is precisely what the Senate did when it elected, consistent with its rules, to remain in session between December 17, 2011, and January 23, 2012. It is neither remarkable nor troubling that the President's "auxiliary" appointment power was rendered unnecessary as a consequence.

2. The Senate Was Not In A "Functional" Recess

Even if the Recess Appointments Clause justified the session-by-session assessment the government urges, the January 4 appointments are invalid. The Senate's pro forma sessions were real sessions – not metaphysical ones. The Senate was not in a "functional" recess.

Most fundamentally, the Senate was capable of performing legislative functions and providing consultation during its pro forma sessions. This is not post hoc speculation – the Senate actually *passed legislation* during the period in question. At the Senate's December 23, 2011, pro forma session, the Senate passed by unanimous consent the Temporary Payroll Tax Cut Continuation Act of 2011. See 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011) (passing H.R. 3765). The President later signed that bill into law. In fact, the bill was passed at the *President*'s urging – belying any claim that the Senate was incapable of acting on presidential requests (or nominations) during this period. *Contra* Pet. Br. 49 (defending appointments on ground that Senate's pro forma sessions rendered it "unable as a body to 'receive communications from the President or participate as a body in making appointments'" (quoting S. Rep. No. 4389, at 2 (1905))).

The government attempts to downplay the significance of this fact by claiming that the "relevant" recess actually began on January 3, 2012 – *not* December 17, 2011 – when the Senate convened pro forma to begin the Second Session of the 112th Congress in accordance with the Twentieth Amendment. Pet. Br. 47-48. This temporal gerrymandering is awkward, to say the least, and happens also to be contradicted by the plain language of the Twentieth Amendment. See Noel Canning Br. 56-57. But it is also rather beside the point. Whether the government thinks the Senate passed a law during *this* "functional" recess, or the "functional" recess immediately preceding it, the point remains that the Senate could pass a law (or provide advice and consent) at *any* pro forma session. That the government must resort to logical origami to explain away the Senate's passage of a law twelve days before the January 4 appointments, during a pro forma session indistinguishable from the one held on January 4, only underscores the malleability of its approach.

Far from there being only a "remote possibility" that the Senate will conduct business in a pro forma session, *contra* Pet. Br. 52, both houses of Congress frequently conduct business in this fashion. For instance, at a pro forma session on August 5, 2011, the Senate passed the Airport and Airway Extension Act of 2011. 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011). Even more recently, in a pro forma session on September 28, 2012, the House passed three bills. 158 Cong. Rec. H6285-86 (daily ed. Sept. 28, 2012). Indeed, according to the Congressional Research Service, the House "regularly permits business on pro forma days, including the introduction and referral of legislation, the filing of committee reports

and co-sponsorship forms, and the receipt and referral of executive communications and Presidential messages." *Id.* at S5954 (Aug. 2, 2012).

The government ignores all of this, and instead touts the fact that the Senate's December 17 scheduling order contemplated that there would be "'no business conducted'" at the sessions in question.[12] Pet. Br. 48 (quoting 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011)). That is true, but irrelevant. The relevant inquiry under the Recess Appointments Clause is whether the Senate is *capable* of acting on appointments – not whether it intends to do so. See *Executive Power – Recess Appointments*, *supra*, at 25 (referring to "a real and genuine recess making it *impossible* for [the President] to receive the advice and consent of the Senate") (emphasis added). Although the government attempts to contest this point, see Pet. Br. 52, its brief repeatedly *adopts* this standard – perhaps because its own multi-factor test is incapable of expression through an articulable rule. See, *e.g.*, *id.* at 45 ("The Senate is in recess when it *cannot* receive communications from the President or participate as a body in the appointment process.") (emphasis added).

As stated above, business can always be conducted in a pro forma session – exactly as it was

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[12] The International Brotherhood of Teamsters asserts that the scheduling order constituted "a binding commitment not to conduct business between December 17 and January 23." Br. for Resp. Int'l Brotherhood of Teamsters at 23. That is wrong. As the union concedes in the very next breath, the scheduling order could be overcome by unanimous consent. See *id.* at 23-24. After all, business *was* conducted during the period in question.

here, just days before the January 4 appointments. The government confuses the Senate's ability to act with its willingness to do so. It would turn the advice-and-consent function on its head if the President could declare a "recess" whenever the Senate stated that it would take no action on a nomination for some period of time.

Nor is it meaningful that the Senate could act only through unanimous consent at its pro forma sessions. *Contra* Pet. Br. 53-55. "The Senate is fundamentally a 'unanimous consent' institution." Walter J. Oleszek, Cong. Research Serv., 98-225, *Unanimous Consent Agreements in the Senate*, at 1 (2008). The vast majority of the Senate's business, *especially* on nominations, is conducted by unanimous consent. Maeve P. Carey, Cong. Research Serv., R41872, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress*, at 5 (2012); see generally Elizabeth Rybicki, Cong. Research Serv., RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure* (2013). In fact, the Senate confirmed an array of presidential nominees by unanimous consent the same day that it scheduled the sessions in question. 157 Cong. Rec. S8769-70 (daily ed. Dec. 17, 2011).[13]

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[13] That there was no quorum during the pro forma sessions also does not mean that they were not "real." There is rarely a quorum on the Senate floor; "[a]s any observer of the Senate soon notices, typically only a handful of Senators are present during floor debates." Elizabeth Rybicki, Cong. Research Serv., 96-452, *Voting and Quorum Procedures in the Senate*, at 1 (2013). Where a quorum is actually necessary to act, the Senate compels the attendance of absent members. *Id.* at 4 n.12; see also U.S. Const. art. I, § 5, cl. 1 ("[A] majority of each [House] shall constitute a Quorum to do Business; but a smaller

The government points out that, even when the Senate has adjourned pursuant to the Adjournments Clause, there is always a possibility that the Senate will return early to conduct business. Pet. Br. 52-54. That is true. See, *e.g.*, U.S. Const. art. II, § 3 (empowering the President, "on extraordinary Occasions, [to] convene both Houses, or either of them"). But it does not follow, as the government claims, that there is no way to distinguish a series of pro forma sessions from an extended adjournment (or a "real" recess). The distinction is straightforward: When the Senate is holding pro forma sessions, it is *convening*; when the Senate has adjourned for an extended period of time, it is not.

As the government concedes, there was nothing "distinctive about the pro-forma sessions" that enabled the Senate to pass legislation. Pet. Br. 54. To the contrary, "that result was merely a function of the fact that, under general Senate procedures, unanimous-consent agreements can always be overridden by unanimous consent." *Ibid.* In other words, the pro forma sessions were Senate sessions like any other, at which the Senate could, and did, conduct business in accordance with its chosen procedures. The Senate routinely uses pro forma sessions to fulfill its constitutional obligations, and there is nothing unique to the Recess Appointments Clause that commands a higher threshold of Senate availability than does the rest of the Constitution. When the Senate has convened as a legislative body – pro forma or otherwise – it is fully capable of

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Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.").

discharging its constitutional mandate. The advice-and-consent function is no exception.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DEBORAH R. WHITE
Retail Industry Leaders Association
1700 N. Moore Street
Suite 2250
Arlington, VA 22209
(703) 600-2067
deborah.white@rila.org

MARK T. STANCIL
Counsel of Record
WILLIAM J. TRUNK
SARAH W. CARROLL
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006
(202) 775-4500
mstancil@robbinsrussell.com

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AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., ET AL.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
**Counsel of Record*
BRIANNE J. GOROD
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St., NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org
Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF AMICUS CURIAE[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in preserving the balanced system of government laid out in our nation's charter and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

On January 4, 2012, pursuant to his authority under the Recess Appointments Clause, President Obama appointed three members to fill vacant seats on the National Labor Relations Board ("NLRB" or "the Board"). These appointments ensured that the NLRB had the quorum necessary to fulfill its statutory obligation to adjudicate charges that employers or unions had engaged in unfair labor practices. Respondent Noel Canning contends, and the court below held, that these

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

appointments were unconstitutional because the Senate was not in "recess" when the President acted or, in the alternative, because the President cannot make recess appointments to fill pre-existing vacancies. These crabbed and erroneous interpretations of the Recess Appointments Clause would undermine the scope of a presidential power that is fundamental to the proper operation of the federal government: the President's ability to make temporary appointments to Executive and Judicial Branch offices when the Senate is unavailable to provide its advice and consent. *Amicus* submits this brief to demonstrate that the Constitution's text, structure, and history all make clear that the Recess Appointments Clause was adopted to ensure that the President could make such temporary appointments. In light of that fundamental purpose, the recess appointments at issue in this case are plainly constitutional.

When the Framers drafted our enduring Constitution, their design sharply departed from the precursor Articles of Confederation in its creation of a strong Executive Branch headed by a single President. Under the Constitution, this new President would have sole responsibility for executing the nation's laws, but he would be aided in that constitutional obligation by subordinate officers of his choosing. Although the Framers thought the Senate should also generally play a role in the appointments process for those subordinate officers and members of the federal courts, they recognized that the Senate would not be continually in session, and they did not want the President to be disabled from making appointments

while the Senate was in recess. Thus, the Framers drafted the Recess Appointments Clause to give the President the Power to fill vacancies that existed while the Senate was in recess and thus unable to participate in the confirmation process.

By giving the President the power to "fill up all Vacancies that may happen during the Recess of the Senate," the Framers ensured that the President could fill any vacancies that existed when the Senate was unable to perform its advise-and-consent function, whether because it was in a recess between sessions or during a session. This interpretation is consistent with Framing-era understandings of the term "recess," and nothing in the text or history of the Clause compels a contrary result. The court below rested its holding in large part on the rarity of intra-session recess appointments during the Founding period, even though the rarity of such appointments is readily explained by the rarity of such recesses during this period. That fact provides no basis for ignoring the Constitution's text and structure and the longstanding practice subsequent to the Framing period.

Similarly, because the Recess Appointments Clause is intended to ensure that the President can make temporary appointments while the Senate is in recess, what matters is not when the vacancy arose, but whether it existed when the Senate was in recess. The court below pointed to evidence that the literal language of the Clause *could* refer to vacancies that arose during the Senate's recess, but nothing that suggests that this is the *only* possible

meaning. To the contrary, evidence from the Founding suggests that the language could also refer to vacancies that *existed* during the recess, and that interpretation is most consistent with the Constitution's structure and history, as well as long-settled practice.

Finally, because the Recess Appointments Clause was adopted to ensure that the President could fill vacancies when the Senate was unable to perform its advise-and-consent function, the fact that the Senate was holding *pro forma* sessions at which "no business" was to be conducted during the recess at issue did not preclude the President from exercising his recess appointment authority. Because no business was to be conducted at these sessions—indeed they often lasted less than a minute with only one Senator in attendance—the Senate remained unavailable to provide its advice and consent to the President's nominees. Thus, the President was empowered by the Recess Appointments Clause to make temporary appointments to the vacant positions on the NLRB. This Court should uphold the President's exercise of that authority.

ARGUMENT

I. THE TEXT, STRUCTURE, AND HISTORY OF THE CONSTITUTION ALL CONFIRM THAT INTRA-SESSION RECESS APPOINTMENTS TO FILL PRE-EXISTING VACANCIES ARE CONSTITUTIONAL

The Appointments Clause of the Constitution vests the President with the authority to "nominate, and by and with the Advice and Consent of the Senate, [to] appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." U.S. Const. art. II, § 2, cl. 2. Immediately following the Appointments Clause, the Recess Appointments Clause vests the President with the "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Id.* art. II, § 2, cl. 3.

The Executive Branch has long understood the Recess Appointments Clause to confer the authority necessary to fill vacancies that exist during any recess when the Senate is unavailable to provide its advice and consent, irrespective of when the vacancy first arose. Consistent with that interpretation, Presidents have made hundreds of recess appointments since the nation's Founding to fill vacancies that existed during Senate recesses, regardless of when those vacancies arose. The court below held that this settled understanding was unconstitutional, concluding that the text and

history of the Recess Appointments Clause compelled a far more narrow interpretation of the President's authority under this provision. This is wrong. The crabbed interpretation of the court below is not only inconsistent with settled practice, it is inconsistent with the structure, text, and history of the Constitution.

A. The Constitution's Structure Supports a Robust Interpretation of the Recess Appointments Clause.

Article II of the U.S. Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. The Constitution's establishment of a "single, independent Executive" was a direct response to perceived infirmities of the Articles of Confederation, which had vested executive authority in the Continental Congress, Arts. of Confed. art. IX, §§ 4, 5. *See, e.g.*, The Federalist No. 70 (Alexander Hamilton) ("all men of sense will agree in the necessity of an energetic Executive"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 Yale L.J. 541, 599-603 (1994) ("the Constitution's clauses relating to the President were drafted and ratified to energize the federal government's administration and to establish one individual accountable for the administration of federal law"); *cf.* Akhil Reed Amar, America's Constitution: A Biography 131 (2005) ("The Constitution's 'President' . . . bore absolutely no resemblance to the 'president' under the Articles of Confederation.").

This new President was given the responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3; *Myers v. United States*, 272 U.S. 52, 117 (1926) ("The vesting of the executive power in the President was essentially a grant of the power to execute the laws."), and, alone among the government offices established by the new Constitution, was required to "be on duty continuously." Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 378 (2005); *see* 12 Op. Att'y Gen. 32, 35 (1866) ("it is of the very essence of executive power that it should always be capable of exercise"). Unlike Congress, which was required only to "assemble at least once in every Year," U.S. Const. art. I, § 4, cl. 2, and could, on consent, adjourn as it saw fit, *id.* art. I, § 5, cl. 4, the President, as designed by the Framers, was always acting to execute the laws. *See* 4 Debates in the Several State Conventions on the Adoption of the Federal Constitution 135 (Elliot ed. 1836) (contrasting Congress, who "are not to be sitting at all times," with the President who is "perpetually acting for the public"); Amar, America's Constitution, *supra*, at 132 ("While the new Congress would go in and out of session, America itself would always be in session, as would the nation's new presiding officer.").[2]

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[2] The idea that the government would be aided by an independent executive in continual service dated back at least to John Locke's foundational work on governmental structure, *see* John Locke, The Second Treatise of Civil Government § 144 (1690) ("it is necessary there should be a power always

Tellingly, the office of the Vice President was established in large part to ensure that the office of the President would never be vacant and that there would be stability in any unplanned presidential succession. *See* Richard Albert, *The Evolving Vice Presidency*, 78 Temp. L. Rev. 811, 815-23 (2005). Two of the Constitution's 27 amendments also provide additional safeguards against the presidency ever being left vacant. U.S. Const. amend. XX (providing for the selection of a president if the President-elect dies or a new president is not selected before the new term is set to begin); *id.* XXV (establishing procedures to fill the vice-presidency and for determining presidential disability).

To aid the President in fulfilling his responsibility to execute the nation's laws, Article II expressly provided the President with the Power to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," U.S. Const. art. II, § 2, cl. 1, and recognized that there would be subordinate Executive Branch officers who would also aid the President in executing the nation's laws. *See Free*

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in being, which should see to the execution of the laws that are made, and remain in force"), but the Framers' interest in "creat[ing] a presidency that, officially, would never sleep" was motivated, at least in part, by "various recesses and quorum failures of the Confederation Congress [that] had compromised America's ability to conduct foreign affairs," Amar, America's Constitution, *supra*, at 132.

Enter. Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3146 (2010) ("In light of '[t]he impossibility that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.' (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)); *Myers*, 272 U.S. at 117 ("the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this court"); The Federalist No. 72 (Alexander Hamilton) (recognizing that there would be "assistants or deputies of the chief magistrate" who "ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence"); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 719 ("If the president is to be an effectual executive, he must have the aid of others, otherwise his power to execute the law is chimerical.").

While the Framers provided that the Senate would be able to give its "Advice and Consent" to executive nominations, they made absolutely clear the importance of the President's authority to appoint subordinate Executive Branch officials, as well as Judges of the Supreme Court and other public servants. U.S. Const. art. II, § 2. As this Court has noted, "[b]y vesting the President with the exclusive power to select the principal (noninferior) officers of the United States, the Appointments Clause prevent[ed] congressional

encroachment upon the Executive and Judicial Branches." *Edmond v. United States*, 520 U.S. 651, 659 (1997). The Framers also believed that vesting the appointment authority in a single individual would tend to produce better appointments than vesting that authority in one or both houses of the legislature. *See id.* ("[t]his disposition was also designed to assure a higher quality of appointments"); The Federalist No. 76 (Alexander Hamilton) ("one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal or perhaps even of superior discernment").

To be sure, the Framers also gave the Senate a role to play to prevent abuses of power, providing that it could offer its advice and consent to any nominations. *See Edmond*, 520 U.S. at 659 (noting that Senate involvement could "curb Executive abuses of the appointment power"). The Framers, however, anticipated that this check would rarely be exercised. *See* The Federalist No. 76 ("It is also not very probable that his nomination would often be overruled."); 3 Joseph Story, Commentaries on the Constitution of the United States § 1526 ("Nor is it to be expected, that the senate will ordinarily fail of ratifying the appointment of a suitable person for the office."). Instead, they believed the Senate's advise-and-consent function would make the President "more circumspect, and deliberate in his nominations for office." *Id.* § 1525; *see* The Federalist No. 76 ("The possibility of rejection would be a strong motive to care in proposing."); *see also* Amar, America's Constitution, *supra*, at 192 ("the need to secure the approval of a separate

branch would serve to deter a president from making corrupt or unwise proposals").

But the Framers did not want the Senate's role to make appointments impossible during the periods when the Senate would be unavailable to provide its advice and consent. Thus, they provided that the President, who would remain continually in service, could make temporary appointments even when the Senate was not available to perform its advice-and-consent function. *See* 4 Debates in the Several State Conventions, *supra*, at 135 (observing that "[t]his power can be vested nowhere but in the executive . . . ; for, though the Senate is to advise him in the appointment of officers, &c., yet, during the recess, the President must do this business, or else it will be neglected; and such neglect may occasion public inconveniences"). As Attorney General Wirt explained in 1823, "the President *alone* cannot make a *permanent appointment* to those offices . . . but that, whensoever a vacancy shall exist which the public interests require to be immediately filled, and in filling which, the advice and consent of the Senate cannot be immediately asked, because of their recess, the President shall have the power of filling it by an appointment to continue only until the Senate shall have passed upon it; or, in the language of the constitution, till the end of the next session." 1 Op. Att'y Gen. 631, 632 (1823).

In other words, the Recess Appointments Clause operates as a critical "supplement" to the Appointments Clause, ensuring that the Senate does not need to stay in session continuously and

that the President will be able to fill any vacancies during recesses. As Alexander Hamilton described it in *The Federalist*, "[t]he ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers," the Recess Appointments Clause created an "auxiliary method of appointment, in cases to which the general method was inadequate." The Federalist No. 67 (Alexander Hamilton); *see id.* (noting that it "might be necessary for the public service to fill [vacancies] without delay"); Story, *supra*, § 1551 ("There was but one of two courses to be adopted; either, that the senate should be perpetually in session, in order to provide for the appointment of officers; or, that the president should be authorized to make temporary appointments during the recess . . . . The former course would have been at once burthensome to the senate, and expensive to the public. The latter combines convenience, promptitude of action, and general security.").[3]

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[3] According to the Fourth Circuit, the "necessary implication" of Hamilton's statement that the joint appointment power could only be ""exercised during the session of the Senate"" was that "recess appointments would be necessary, and thus permissible, only outside the session of the Senate." *N.L.R.B. v. Enter. Leasing Co.*, 722 F.3d 609, 648-49 (4th Cir. 2013). But the point of Hamilton's statement is that the joint power can only be exercised *when the Senate is available*; when the Senate is *not* available, the President is authorized to make temporary appointments without the Senate's advice and consent.

Accordingly, the Recess Appointments Clause, properly understood, was designed to confer on the President the power to ensure that vacancies in the Executive and Judicial Branches could be filled even when the Senate was not available to provide its advice and consent. The Third and Fourth Circuits concluded otherwise. According to these courts, the purpose of the Recess Appointments Clause was just the opposite: to limit the President's appointment power. *See NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203, 229 (3rd Cir. 2013) ("a crucial aspect of the Clause's purpose [was] to preserve the Senate's advice-and-consent power by limiting the president's unilateral appointment power"); *Enter. Leasing Co.*, 722 F.3d at 634 ("the Recess Appointments Clause was designed to prevent the President from unilaterally exercising appointment power"). This makes no sense. The Recess Appointments Clause was an affirmative grant of "unilateral appointment power" to the President; he would not have had that power at all were it not for the Recess Appointments Clause. Thus, although the Clause did put limits on the scope of that power, those limits were plainly not the principal reason the Framers adopted the Clause.

In sum, the scope of the Recess Appointments Clause must be understood in the context of the purpose it was intended to serve. Limiting the President's exercise of that authority to inter-session recesses or to vacancies that arose during the recess would undermine the ability of the Clause to serve its purpose in the constitutional

structure. Nothing in the Constitution's text or history compels a contrary result, as the next two sections show.

B. The Text and History of the Recess Appointments Clause Confirm That the President's Authority Is Not Limited to Inter-Session Recesses.

As noted above, the Recess Appointments Clause gives the President the "Power to fill up all Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. The Clause plainly does not distinguish between inter-session and intra-session recesses. Instead, it simply uses the term "Recess," which would have been understood at the time of the Framing to refer to any "[r]emission or suspension" of the Senate's activities. 2 Samuel Johnson, A Dictionary of the English Language 1650 (1755).

Indeed, it would have been odd for the Framers to distinguish between inter-session and intra-session recesses, given the functional purpose the Recess Appointments Clause was intended to serve. As discussed above, the Recess Appointments Clause was intended to ensure that the President could appoint public officials for temporary periods when the Senate was unable to perform its advice-and-consent function, *see* 1 Op. Att'y Gen. at 632 ("The substantial purpose of the constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed."), and the Senate is no more available to provide its advice and consent during an intra-

session recess than during an inter-session one. Further, there is no reason to think that the need to fill vacancies in important government positions would be any greater during inter-session recesses than during intra-session ones. *Id.*[4]

The court below rested much of its argument to the contrary on the supposed significance of the Clause's use of the definite article "the," rather than one of the indefinite articles, "a" or "an." Pet. App. 19a (explaining that the difference between "'the Recess'" and "'a recess'" is "not an insignificant distinction" and "[i]n the end it makes all the difference"). According to the court, "that definite article suggests specificity," and because "[i]t is universally accepted that 'Session' [in the Clause] refers to the usually two or sometimes three sessions per Congress," "'the Recess' should be taken to mean only times when the Senate is not in

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[4] The court below rejected a "functional approach" to defining the meaning of the Recess Appointments Clause, preferring the "clarity of the intersession interpretation." Pet. App. 28a. But far from offering enhanced "clarity," the approach taken by the court below leads to the absurd result that the President could make recess appointments during an inter-session recess, no matter how short, but not during a lengthy intra-session recess. *See* Alexander M. Wolf, Note, *Taking Back What's Theirs: The Recess Appointments Clause, Pro Forma Sessions, and a Political Tug-of-War*, 81 Fordham L. Rev. 2055, 2076 (2013) (recounting President Theodore Roosevelt's appointment of 160 officials during the "'infinitesimal fraction of a second,' when a session is first gaveled in, 'which is the recess between the two sessions'"). This cannot have been what the Framers had in mind when they structured the presidential appointment powers.

one of those sessions." *Id.* at 20a. This is plainly wrong.

To start, "a" and "an" can also suggest specificity (as in, "I interviewed an applicant yesterday whom I liked very much"), and "the" can also refer to a class of things, Pet. Br. 16-17. As the Government has noted, "the Constitution directs the Senate to choose a temporary President of the Senate 'in *the Absence* of the Vice President,'" a directive that does not apply to any specific type of absence. *Id.* One cannot imagine that that phrase would mean anything different had the Framers provided for a temporary President of the Senate "during an Absence of the Vice President." Moreover, the court below offers no reason to conclude from the choice of a definite article that the specific recesses the Framers had in mind were inter-session recesses, rather than (for example) those recesses when the Senate was functionally unable to perform its advise-and-consent function.

The Third and Fourth Circuits ultimately agreed with the court below, but relied on somewhat different textual grounds in doing so. *See New Vista*, 719 F.3d at 245 (rejecting the textual analysis of the court below); *see also Enter. Leasing Co.*, 722 F.3d at 648 (describing the "textual evidence" cited by the court below as "inconclusive"). For example, both courts concluded that recess appointments can only be validly made during an inter-session recess because, in part, "nothing in the Constitution establishes the necessary length of an intrasession break that would constitute a recess." *New Vista*, 719 F.3d at

234; *see Enter. Leasing Co.*, 722 F.3d at 644. But the Constitution also does not establish a "necessary length" for inter-session recesses, even though they can be infinitesimally short. Instead of establishing a bright-line rule that would define the length of a "Recess," the Framers made the inquiry a functional one, *viz.*, whether the Senate was unavailable to provide its advice and consent. *See supra* at 11-13.[5]

These courts also emphasized that recess appointments last until the "End of [the Senate's] next Session." *New Vista*, 719 F.3d at 234; *Enter. Leasing Co.*, 722 F.3d at 644. But that does not mean that the term "recess" only refers to inter-session recesses. Because the Framers anticipated that the President would be able to make recess appointments whenever the Senate was unable to provide its advice and consent, be it because of an

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[5] The Court need not determine in this case whether there is any minimum duration that is constitutionally required to trigger the President's recess appointment authority because the recess here was plainly long enough, as long-settled Executive Branch practice reflects, *see Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. Off. Legal Counsel __, 2012 WL 168645, at *5 & n.9 (Jan. 6, 2012) ("The last five Presidents have all made appointments during intrasession recesses of fourteen days or fewer."); *see* Pet. Br. 45. This functional definition also answers the Fourth Circuit's concern that "[t]he Framers would not have contemplated any need to set aside 'the ordinary power of appointments' during short breaks." *Enter. Leasing Co.*, 722 F.3d at 649 (internal citation omitted). No one would think that the Senate is unavailable to provide its advice and consent simply because it adjourns for the weekend or takes a "short break[]."

intra-session recess or an inter-session one, they needed to ensure that the temporal limit in the Clause would accommodate both situations.[6]

Beyond the textual evidence, the court below also placed tremendous significance on the putative lack of intra-session recess appointments in the period immediately after the Framing, explaining that "it is well established that for at least 80 years after the ratification of the Constitution, no President attempted such an appointment, and for decades thereafter, such appointments were exceedingly rare." Pet. App. 23a-24a; *see id.* at 24a ("early understanding of the Constitution is more probative of its original meaning than anything to be drawn from administrations of more recent vintage").

But there is a simple explanation for that fact that says nothing at all about the constitutionality of such appointments, or how they would have been viewed by the Founding generation. There were few intra-session recess

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[6] The Fourth Circuit also contrasts the use of the term "[a]djournment" in other provisions of the Constitution with the use of the term "Recess" in the Recess Appointments Clause. It concludes that the term recess must "refer[] to a particular sort of adjournment, the break between sessions of the Senate," *Enter. Leasing Co.*, 722 F.3d at 648, but it offers no reason why this would be so. Given the purpose of the Recess Appointments Clause, it makes far more sense to conclude that the "particular sort of adjournment" to which the term "the Recess" refers is one that is, as noted above, long enough that the Senate is functionally unavailable to provide its advice and consent.

appointments during this early period because, as the court below acknowledged, there were few intra-session recesses during this period. And there were none of any significant length. *See* Pet. App. 24a ("it is true that intrasession recesses of significant length may have been far less common in those early days than today"). As Edward Hartnett explains, the early Congresses were characterized by very long inter-session recesses and "occasional intrasession recesses lasting about a week or so in December or early January, typically spanning the Christmas and New Year holidays." Hartnett, *supra*, at 408; T.J. Halstead, Congressional Research Service, RL33009, *Recess Appointments: A Legal Overview* (July 26, 2005) (noting that Congress "took few intrasession recesses, other than brief holiday recesses, until the advent of the modern era"); Peter Strauss, *The Pre-Session Recess*, 126 Harv. L. Rev. F. 130, 131 (2013) ("[i]n the travel circumstances of the time, short recesses were not likely").[7]

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[7] According to the Third Circuit, there is "no reason to discount the" relevance of the early history just because "intrasession breaks were generally no longer than two weeks" because "modern practice has shown[] [that] it is sometimes in the interest of presidents to make recess appointments during breaks as short as two weeks." *New Vista*, 719 F.3d at 639. But given the speed with which modern Presidents must often react to events (and the fact that early intra-session recesses occurred over holidays), it is utterly unsurprising that early presidents saw less need than modern presidents to make recess appointments during intra-session recesses of similar length.

But now the Senate frequently takes lengthy intra-session recesses. Indeed, the change in presidential use of the recess appointment authority corresponds almost exactly with the change in the Senate's recess practices. As noted above, the court below emphasized the absence of intra-session recess appointments "for at least 80 years after the ratification of the Constitution." Pet. App. 23a. But, as Hartnett points out, "[t]he first time that Congress took an extended intrasession recess was during the Presidency of Andrew Johnson," roughly 80 years after the Constitution was ratified. Hartnett, *supra*, at 408. Given that early intra-session recesses were exceedingly rare and always short, and that they generally occurred over holidays when little, if any, government business would have been conducted, it is utterly unsurprising that the early presidents saw little need to make intra-session recess appointments.

According to the court below, the presidential recess appointments power, expressly granted in the text of the Constitution and repeatedly exercised by numerous Presidents, should now be effectively eliminated because the conditions under which it could be exercised rarely, if ever, arose during the Founding period. That cannot be right. *Cf. Boumediene v. Bush*, 553 U.S. 723, 752 (2008) (concluding that the Court should not "infer too much, one way or the other, from the lack of historical evidence on point" when the relevant historical period did not reveal "cases with close parallels to this one"). The text, history, and structure of the Constitution all support the settled

view that the President may make recess appointments during those intra-session recesses when the Senate is unavailable to provide its advice and consent.

C. The Text and History of the Recess Appointments Clause Confirm That the President's Recess Appointment Authority Extends to All Vacancies That Exist During a Recess.

As noted above, the Recess Appointments Clause provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate." U.S. Const. art. II, § 2, cl. 3. Consistent with the Clause's purpose to enable the President to ensure the smooth functioning of government by continuing to fill vacancies when the Senate is unable to provide its advice and consent, "both the courts and the Executive Branch have consistently construed the recess clause as giving the President the authority to fill all vacancies that exist while the Senate is in recess," regardless of when the vacancy arose. *United States v. Woodley*, 751 F.2d 1008, 1013 (9th Cir. 1985); *see* Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 576-77 n.16 (2012) (noting that "[s]ince [1823], the overwhelming mass of actual practice has supported the" position that the President may make recess appointments to any position that is vacant during the Senate's recess).

Any other interpretation would leave the President unable to fill an office, no matter how

important, for nearly a year if the vacancy arose right before the start of a lengthy recess, even an inter-session one. *See* 1 Op. Att'y Gen. at 632 (raising the hypothetical of a vacancy that occurs "on the last day of the Senate's session," so that the President does not even know about it before "the Senate rises" which cannot then be filled even though "the public interests may imperiously demand that it shall be immediately filled"); *id.* at 633 ("whether it arose during the session of the Senate, or during their recess, it equally requires to be filled"); *see also United States v. Allocco*, 305 F.2d 704, 712 (2d Cir. 1962) (noting that limiting recess appointments to vacancies that arose during a recess "would create Executive paralysis and do violence to the orderly functioning of our complex government").

The court below held that the text of the Recess Appointments Clause nonetheless forecloses this understanding because, in large part, it would render "the operative phrase 'that may happen' . . . wholly unnecessary." Pet. App. 36a. Then, having assumed that its "logical analysis" of the language was correct, the court simply sought to determine whether its understanding of the language was "consistent with the understanding of the word contemporaneous with the ratification." *Id.* This analysis is wrong on both counts. To start, as the Government explains, the phrase "that may happen" ensured that a President could not fill up *future* vacancies—for example, ones that had been announced, but not yet occurred—during a recess. Pet. Br. 30-31. Such an action would, of course, be entirely inconsistent with the purpose of the Clause

because the Senate would be available to offer its advice and consent at the point when those vacancies needed to be filled.

Moreover, the text plainly does not compel the conclusion that the court below reached. To the contrary, "[i]n a vacuum, the use of the word *happen* could be interpreted to refer to vacancies that either 'happen to occur' or 'happen to exist' during a recess of the Senate." *Woodley*, 751 F.2d at 1012. In other words, "[a] vacancy in an office . . . can be understood to 'happen' either at the moment that the prior occupant left, or to 'happen' the entire time that the office or room is unoccupied." Hartnett, *supra*, at 383; *see* 12 Op. Att'y Gen. at 34 (1866) ("The subject-matter is a *vacancy*. It implies duration, a condition or state of things which may exist for a period of time. Can it be said that the word *happen*, when applied to such a subject, is only properly applicable to its beginning?" (emphasis in original)). And this was as true at the time the Constitution was drafted as it is today. *See* Thomas Dyche & William Pardon, A New General English Dictionary 376 (1760) (defining "happen" to mean either "to come to pass" or "to be"); *see also* Pet. Br. 30 (quoting 1755 definition of "vacancy" as meaning the "[s]tate of a post or employment when it is unsupplied"). The court below erred in considering only whether its view was consistent with contemporaneous understandings of the word "happen," rather than considering whether its view was the *only one* consistent with those understandings. This was too thin a reed to justify supplanting the long-settled practice under the Recess Appointments Clause.

See Rutan v. Republican Party of Illinois, 497 U.S. 62, 95 n.1 (1990) (Scalia, J., dissenting) (explaining that there is a "role [for] tradition in giving content only to *ambiguous* constitutional text" (emphasis in original)).

The history of the Clause also supports the interpretation that the presidential recess appointments power extends to vacancies that exist during a recess, even if they did not arise during that recess. As the Government notes, "[s]ince the 1820s, the vast majority of Presidents have made recess appointments to fill" pre-existing vacancies, Pet. Br. 35, and "each of [the first four] Presidents made appointments, or expressed views, that were inconsistent with the court of appeals' categorical conclusion that a vacancy cannot be filled if it first arose before that recess," *id.* at 39; *see* Hartnett, *supra*, at 390 ("interpreting the Recess Appointments Clause to permit appointments when the vacancy first arose before the recess is not some later invention, but is older than, for example, *Marbury v. Madison*"). Again, the court below emphasizes that there was some disagreement of opinion on this point during the nation's early history, Pet. App. 38a-41a, but mere disagreement is not enough to carry the day when this interpretation would significantly undermine the purpose of the Clause, as previously discussed. *See supra* at 11-13.

The court below does not meaningfully grapple with that problem. It suggests that "Congress can address this issue" (Pet. App. 44a), but it does not explain why the Framers would

have wanted the President to be able to fill vacancies that arose during a recess, but not ones that arose the day before a recess. Indeed, at the Framing, "[n]ews of vacancies occurring during a session might very well not even [have] reach[ed] the President until after the Congress had risen." Strauss, *supra*, at 131. Nor does the court explain why the Framers would have wanted the constitutionality of recess appointments to turn on when exactly the vacancy arose, a fact that would often have been difficult to determine at the time of the Founding, *see* Hartnett, *supra*, at 397 (noting the "difficulty in ascertaining" when certain vacancies arose), rather than whether it existed at the time of the recess. Only by looking at whether the vacancy existed at the time of the recess is it possible to make sense of the text, history, and purpose of the Recess Appointments Clause.

II. THE SENATE'S *PRO FORMA* SESSIONS DID NOT PRECLUDE THE PRESIDENT FROM EXERCISING HIS RECESS APPOINTMENT AUTHORITY

As just explained, the text, history, and purpose of the Recess Appointments Clause all make clear that the Clause was adopted to ensure that the President could make temporary appointments to Executive and Judicial Branch offices even when the Senate was unavailable to provide its advice and consent. Where, as here, the Senate announces that for over a month it will be holding only *pro forma* sessions, at which "no business [will be] conducted," and the Senate has indicated that it is not available to provide advice

and consent on presidential nominations, the President may exercise his recess appointment authority.

As the Government's brief explains, when the Senate adjourned on December 17, 2011, it agreed by unanimous consent that for the end of the First Session of the Congress and the beginning of the Second Session, it would "convene for pro forma sessions only, *with no business conducted*." Pet. Br. 48 (emphasis added); *see* Pet. App. 91a.[8] It further specified that when it reconvened on January 23, 2013, the Senate would, among other things, conduct "morning business" and hold "executive session." Pet. App. 91a-92a. Thus, by the very terms of the Senate's decision to adjourn, it made clear that it was unavailable to conduct any business, including providing its advice and consent on the President's nominees, during the 20-day period between the Second Session's beginning on January 3, 2012 and its next regular session on January 23.[9] In fact, before adjourning for this

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[8] By operation of the Twentieth Amendment, the Second Session of the Congress began at noon on January 3, 2012. Pet. Br. 48.

[9] On December 23, 2011, during an 85-second session at which two senators were present, the Senate gave its unanimous consent to a payroll tax cut. Jeff VanDam, Note, *The Kill Switch: The New Battle over Presidential Recess Appointments*, 107 Nw. U. L. Rev. 361, 379-80 (2012). This one act does nothing to undermine the constitutionality of the President's recess appointments. As noted above, the Senate had advised the President that "no business" was to be conducted during its recess, and this 85-second session at which only two senators were present hardly gave the

recess, the Senate took "special steps to provide for the appointment of congressional personnel" during the recess, "indicating that the Senate recognize[d] that it [was] not in session during this period for the purpose of making appointments under ordinary procedures." *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. Off. Legal Counsel __, 2012 WL 168645, at *3 (Jan. 6, 2012).

The Senate's provision that "no business" was to be conducted during the *pro forma* sessions made sense in light of the fact that such sessions often lasted for less than a minute, *see, e.g.*, 157 Cong. Rec. D1404 (daily ed. Dec. 30, 2011) (pro forma session that lasted from 11:00:02 until 11:00:34 a.m.), and there was often only one Senator present, *id.* S8793 (daily ed. Dec. 30, 2011); *see generally* Pet. Br. 48-49. Senators knew they were free to return to their States and did not need to return for the *pro forma* sessions because, as the Senate order announcing adjournment made clear,

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President reason to think that the Senate was prepared to act on his nominations. Surely, many Senators would have been surprised if the Majority Leader had also asked for unanimous consent for the President's nominees, and they were considered confirmed simply by the lack of objection from any member. Moreover, even if this particular *pro forma* session did interrupt the recess that began on December 23, 2011 (which it did not), *no* business was conducted between the commencement of the Second Session on January 3 and the start of the regular session on January 23.

"no business" would be conducted at those sessions. Thus, during this period, the Senate did not purport to be available to fulfill its advice and consent function, making the use of the President's recess appointment authority appropriate.

To be sure, the Senate has some control over the President's ability to exercise his recess appointment authority. If the Senate chooses to remain continually in session so it can act upon the President's nominees, the Senate would be available to provide its advice and consent and use of the recess appointment authority would be unnecessary. But so long as the Senate has adjourned and advised the President and the public that it will not be conducting any business, the only way for the President to exercise his appointment authority and ensure that important Executive and Judicial Branch offices remain filled is to use his recess appointment authority. The President properly exercised that authority here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
*Counsel of Record
BRIANNE J. GOROD
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER

1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org
Counsel for Amicus Curiae

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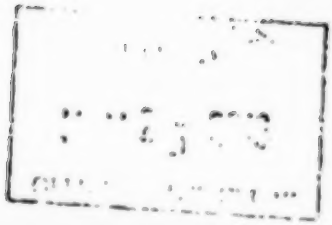

No. 12-1281

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

NOEL CANNING, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

MICHAEL W. MCCONNELL
Counsel of Record
559 Nathan Abbott Way
Stanford, CA 94305
(650) 736-1326
mcconnell@law.stanford.edu
WILLIAM BAUDE
1111 E. 60th St.
Chicago, IL 60637
Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF THE AMICI CURIAE

The signatories to this brief (listed in Appendix A) teach and write about constitutional law. They have an interest in the reasoning this Court uses in constitutional cases.[1] While the outcome of any particular recess appointments case may have short-term political implications, there is no long-term partisan interest in interpreting the Clause in one way or another.

STATEMENT

Especially in the absence of judicial precedent, disputes about the Constitution's meaning often reduce to disputes about interpretive methods. The interpretive tools are familiar: constitutional text, structure, historical context, early practice (which bears on original meaning), longstanding practice (which constitutes nonjudicial precedent), and pragmatic consequences. Disputes arise, however, over their relative force. For purposes of this brief, *amici* take no position on the relative weight or merit of these methodologies, except to say that the Court should: (1) take care to ensure that it relies on accurate and complete historical facts, (2) consider pragmatic consequences only as related to the purposes of the constitutional provision, and (3) apply the same methodology consistently to each of the sub-issues in the case.

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[1] The parties' written consents to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. No person other than amici curiae or their counsel (and hence, no party or its counsel) made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Under any plausible method of interpretation, consistently pursued, the President's recess appointments to the NLRB on January 4, 2012, are problematic.

1. The original meaning of the text of the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, empowered the President to fill vacancies only if they arise while the Senate is in recess. That clear original meaning is confirmed by the purpose of the Clause, and by both Presidential and Congressional practice during the Republic's early years. After some Presidents began to depart from this practice, the Senate resisted for almost a century.

2. Although the ordinary meanings of the terms "recess" and "session" are ambiguous, the purpose and structure of the Clause and long practice confirm that the "recess" is the formal recess that occurs between formal "sessions" of the Senate, not including adjournments while a session is in progress. In any case, if one abandons that formal definition of "recess," as has been common since 1905, consistency demands abandonment of the corresponding formal definition of "session," resulting in recess appointments that last for weeks, not years.

3. The text arguably has little to say about the validity of the Senate's "pro forma" sessions, although the Rules of Proceeding Clause, *id.* art. I, § 5, cl. 2 suggests that it is the Senate, not the President or this Court, that ought to judge their validity. In any case, longstanding modern practice treats pro forma sessions as valid for purposes of the Adjournments Clause, *id.*, art. I, § 5, cl. 4, and the Assembling Clause, *id.*, amend. XX, § 2, as well as to pass legislation. There is no logical reason to treat pro forma ses-

sions as nullities only under the Recess Appointments Clause.

No consistent application of any of these methodologies supports the Solicitor General's construction. If recent practice overrides original meaning and early practice, as would be necessary to reject the "arise" view, then there is no answer to consistent recent use of pro forma sessions for a variety of constitutional purposes, including avoiding a "recess" during which the President might make recess appointments. If "recess" is to be given a functional rather than a formal definition, so must "session." If the Court consistently applies a theory of constitutional interpretation to the three questions presented in this case, then the appointments are unconstitutional.

ARGUMENT

I. Under The Text and Original Meaning of the Recess Appointments Clause, The Office Must Fall Vacant During The Recess

The Recess Appointments Clause states that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. The most obvious meaning of the word "happen" is to "occur" or "take place," and the most obvious meaning of the word "vacancy" is the event where an office becomes vacant. Cf. *id.* art. I. § 3, cl. 2 ("if [Senate] Vacancies happen by Resignation, or otherwise ..."). This implies that the President may fill a vacancy by recess appointment only if the office *arises* during the recess.

The Solicitor General's brief contends the word "happen" is ambiguous, and could mean that the vacancy merely *exists* during the recess. Even if there is some linguistic ambiguity, which we doubt, the "arise" interpretation is the best reading of the text, and is confirmed by the original history and primary purposes of the Clause. The "exist" reading rises or falls on an argument from longstanding practice—but this practice is not so longstanding or unchallenged as the Solicitor General's brief suggests.

A. The Text Requires The Vacancy To Arise During The Recess

The most straightforward reading of the Clause is that the President may fill offices that *became vacant* during the recess, through death, resig-

nation, or removal of the previous office holder, by conclusion of a fixed term, or (perhaps) by creation of the office.[2] Now as in 1787, this is the natural reading of the word "happen." The first American dictionary defined "to happen" as "to come by chance," "to fall out," "to come," or "to befall"—all definitions that emphasize the initial occurrence of an event. Noah Webster, *An American Dictionary of the English Language* (1828). Nearly every founding-era English language dictionary agreed. See Brief of Scholars of the Constitution's Original Meaning as Amici Curiae, at 5-7.

Even some of the executive opinions that developed the "exist" interpretation acknowledged that the "arise" reading was more consistent with the Constitution's text. Attorney General Wirt called it "most accordant with the letter of the Constitution," 1 Op. Att'y Gen. 631, 632 (1823). Similarly, in 1862, Attorney General Bates wrote to President Lincoln that "If the question were new, and now, for the first time, to be considered, I might have serious doubts" about the "exist[]" interpretation. 10 Op. Att'y Gen 356, 356 (1862).

B. The Clause's Purpose Supports the "Arise" Interpretation

The Clause's purpose, in the context of the Appointments Clause as a whole, confirms the most natural reading of the text. Outside of recess appointments, the Constitution requires the Senate's

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[2] There was some historical controversy over whether a vacancy "happens" when an office is first created. Note, Amelia Frenkel, *Defining Recess Appointments Clause "Vacancies,"* 88 N.Y.U. L. Rev. 729 (2013). The Court need not resolve that question in this case.

participation—direct or indirect—in all appointments. First, all judges and principal officers must be appointed "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. For inferior officers "Congress may by law" delegate the appointment power to the President or to others, without Senatorial confirmation. *Id.* Hence, in all regular appointments, the Senate must either consent to the nomination directly, or consent to a law that delegates the appointment. These provisions are an important check on the President's ability to staff the executive branch with "unfit characters," *The Federalist No. 76*, at 392 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001). Attorney General Edmund Randolph aptly observed: "The Spirit of the Constitution favors the participation of the Senate in all appointments." Edmond Randolph's Opinion on Recess Appointments (July 7, 1792), in 24 *Papers of Thomas Jefferson* 165 (Oberg & Looney eds., 2008).

The constitutional baseline indicates the proper scope of the Recess Appointments Clause. The Clause anticipates circumstances when the Senate cannot consent either directly or prospectively. In this sense the Clause is "to be considered as an exception to the general participation of the Senate. It ought too to be interpreted strictly." *Id.*

The "arise" interpretation is consistent with this view. Under the "arise" interpretation, the President may make an immediate recess appointment and forgo Senate confirmations when (but only when) there is no realistic chance for the Senate to participate. Under the "exist" interpretation, by contrast, Presidents can wait until a "recess" in Senate business (however defined) and then appoint officers, including judges, for terms as long as two years, with-

out troubling to obtain advice and consent. Worse yet, he can appoint officers already rejected by the Senate, which some Presidents have done.

The "arise" interpretation is admittedly not perfectly congruent with the evident purposes of the Clause. As a practical matter, the President may not be able to fill a vacancy that occurs very near the end of the session; conversely, there is no real need for recess appointments if the vacancy occurs shortly before the session begins. Attorney General Wirt relied on such pragmatic considerations for his nontextual interpretation in 1823. He worried about what would happen if a vacancy happened during the Senate's session, but was not discovered until after the Senate recessed, or about "the sudden dissolution of that body by some convulsion of nature; the falling of the building in which they hold their sessions; a sudden and destructive pestilence, disabling or destroying a quorum of that body." Wirt, *supra*, 1 Op. Att'y Gen. at 633. Pragmatic considerations of this sort are a potential strike against the "arise" interpretation. But the Solicitor General's interpretation is far less tethered to the purposes of the Clause: the President can make appointments not just when the Senate is "unavailable" but when it disagrees with him. Moreover, the practical difficulties with the "arise" view can be avoided through the use of acting officers (in many cases) and by the President's constitutional power "on extraordinary Occasions," to call the Senate into session when it is in recess. U.S. Const. art. II, § 3.

A further difficulty with following the literal meaning of the Clause is that it might seem to allow Presidents to *make* recess appointments during the subsequent session so long as they *arose* during the recess. But this difficulty, if it is one, plagues the "ex-

ist" interpretation no less than the "arise" interpretation.

As a matter of practice, it is common ground among the various views that the vacancy must be "fill[ed]"—as well as "happen"—"during the recess of the Senate." That reading is supported by a practice more longstanding and unbroken than any other discussed in this case. Presidents have always made recess appointments *only* when they maintained that the Senate was in recess. *The Federalist* states flatly that under the Clause the President must make the appointment "during the recess." *The Federalist No. 67*, at 350 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

C. The Earliest Interpreters Endorsed the "Arise" Interpretation

In the Republic's early decades, Congress and the executive branch both maintained that an office must *become* vacant during the recess to trigger the recess appointment power. A 1791 statute established an office and provided that "[i]f the appointment ... shall not be made during the present session of Congress, the President may, and he is hereby empowered to make such appointments during the recess of the Senate, by granting commissions which shall expire at the end of their next session." Act of March 3, 1791, ch. 15, § 4, 1 Stat. 199, 200. This provision would have been wholly redundant under the "exist" view of the Recess Appointments Clause.

The Washington Administration took the same view of the Clause. In the first formal executive opinion on the Clause, Attorney General Edmund Randolph confronted the executive branch's power to make a recess appointment to the office of "chief

Coiner" of the Mint—an office that had been created in April of 1792, a month before the Senate's recess began. Is it, Randolph asked, a "vacancy which has *happened* during the recess of the Senate?" Randolph, 24 *Papers of Thomas Jefferson*, *supra*, 165. No, he answered: "It is now the same and no other vacancy, than that, which existed on the 2nd. of April 1792. It commenced therefore on that day or may be said to have *happened* on that day." *Id.* Leading commentators on the Constitution, of both Federalist and Jeffersonian persuasions, agreed. See Michael Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1482, 1518-1521 (2005) (quoting Hamilton, a Federalist, and Tucker, a Jeffersonian).

President Washington repeatedly confirmed Randolph's view of the Clause. Washington made recess appointments only when the office had become vacant during the recess. On several occasions Washington was confronted with vacancies late in the Senate session, when potential nominees could not be contacted before the end of the session. *Id.* at 1522. Washington and the Senate found a way to fill these offices consistent with the "arise" interpretation—the President would nominate an officer and the Senate would confirm him, all without the officer's consent. *Id.* After the session was over, if the officer refused to serve, Washington treated that as a resignation, which created a new vacancy *during the recess* and could then be replaced by a recess appointment.

The Solicitor General claims President Washington broke from this practice twice—when he appointed Robert Scot as Engraver of the Mint, and William Clarke as United States Attorney of Kentucky. U.S. Br. 39-40. The history, however, strongly suggests both vacancies arose during a recess.

Washington himself said they arose during a recess. He wrote: "I nominate the following persons [including Scot] to fill the offices annexed to their names respectively; to which, having *fallen vacant during the recess* of the Senate, they have been appointed." S. Exec. J., 3d Cong., 1st Sess. 142–43 (1793) (emphasis added). Likewise, "I nominate the following persons [including Clarke] to fill the offices annexed to their names, respectively, which *became vacant during the recess* of the Senate." S. Exec. J., 4th Cong., 2d Sess. 216-17 (1796) (emphasis added). Even if Washington misapprehended the facts, he apparently believed he was acting within the recess appointments power because he supposed that the offices "became vacant during" a recess.

Moreover, it is unlikely that Washington was mistaken on the facts. The Act of April 2, 1792, made it "lawful for the functions and duties of Chief Coiner and Engraver to be performed by one person." Act of April 2, 1792, ch. 16, § 3, 1 Stat. 246, 247. Henry Voigt therefore likely had been acting as Chief Coiner *and* Engraver. When he decided to extend the Engraver position to Scot, Washington likely created and filled that vacancy at once—during the recess.

As the Solicitor General's brief suggests, the United States Attorney vacancy filled by Clarke also probably arose during a recess. Clarke's predecessor, William McClung, "was confirmed on June 2, 1794. S. Exec. Journal, 3d Cong., 1st Sess. 160." U.S. Br. 40 n.31. The Senate recessed on June 9. S. Exec. J., 3d Cong., 1st Sess. 162. "McClung had declined that appointment by October 1794." U.S. Br. 40 n.31. The next Senate session began on November 21, 1794. S. Exec. J., 3d Cong., 2d Sess. 163. Unless McClung declined to serve during the seven-day window between his confirmation and the recess—a period shorter

than the time it would take for a message to get from New York City to Kentucky—then he must have declined his commission during the recess, rendering the office vacant.

The Clarke appointment thus does not violate the "arise" interpretation or support the "exist" interpretation. But it does present an oddity: because Washington waited until the recess of 1796 to make the Clarke appointment, it appears that Washington filled a vacancy that "happened" during the 1794 recess "during" the 1796 recess (unless there was another nomination and appointment between McClung and Clarke, which the sources do not rule out). See Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky, 1789-1816*, at 72 n.81 (suggesting that the post may have been filled, if briefly, by George Nicholas, in 1796). In a private letter, Washington indicates that he had simply forgotten about the appointment. Letter from George Washington to Timothy Pickering (Oct. 10, 1796).[3] No one appears to have commented on the aberration. But under no theory does the Clarke appointment support the Solicitor General's argument.

The Solicitor General makes a similarly unfounded claim that Thomas Jefferson's early appointments of several district attorneys and marshals filled vacancies that did not arise during the recess. U.S. Br. 41-42. The Solicitor General's evidence is that the offices were created by a statute on February 13, 1801, during the session. §§ 36-37, 2 Stat. 89, 99-100. But the very sections the Solicitor General cites provide that the previously-appointed marshals and district attorneys who lived in those districts would

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[3] Available at http://founders.archives.gov/documents/Washington/99-01-02-01011.

hold the new offices until the President removed them. *Id.* So the new offices were likely filled by the old district attorneys and marshal until Jefferson nominated their replacements, which he did during the recess.

Nor is there anything in Jefferson's letter to Wilson Nicholas, relied upon by the Solicitor General, U.S. Br. 42, suggesting he took a broad view of the recess appointment power. Though Jefferson described the Clause as "susceptible of both constructions," his chief concern seems to have been that some of the legal fictions used in the previous administrations were too broad. 36 *Papers of Thomas Jefferson* 433 (2009). He said: "if we find that any of our cases go beyond the limits of such a rule, we must consider what will be the best way of preventing their being considered as authoritative examples."[4] *Id.* There is no reason to think that Jefferson supported a *broader* view of the power than his predecessors had.

Madison's practice is somewhat less clear. His only articulated position on the question, in connection with his delayed appointment of Andrew Jackson to a generalship, see Resp. Br. 39, squarely embraced the "arise" view. But he made five appointments that may or may not have conformed to that view. Compare U.S. Br. 42-43 with Resp. Br. 44. One was the recess appointment of Theodore Gaillard to a judgeship vacated by the resignation by Dominic Hall. Hall's date of resignation is uncertain, but it may have been during the session. Compare Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev.

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[4] Available at http://founders.archives.gov/documents/Jefferson/01-36-02-0280.

377, 400-01 (2005) (arguing it was during the session) with Rappaport, *Original Meaning*, *supra*, at 1534 n.142 (arguing that this is not clear). In any case, Gaillard declined the recess appointment.

Two other appointments were to offices created on March 3, 1815, the last day of the Senate's session. On that day, Madison signed legislation creating two new offices, which he later filled by recess appointment. Looking solely at the Senate Journal, it appears that he signed the bill before the Senate recessed, but a comparison to the House's records in the Annals of Congress suggests that the Senate may have announced its recess before receiving the message from the Clerk of the House that Madison had signed the legislation. Compare S. Journal, 13th Cong., 3d Sess. 689-90 (Mar. 3, 1815) with 28 Annals of Cong. 1274 (Mar. 3, 1815) (House of Representatives).

Finally, Madison recess appointed the first U.S. Attorney and Marshal for the Territory of Michigan, although those offices were created during the session U.S. Br. 43. We are not aware of any evidence that would square these two appointments with the "arise" view. Yet we are also less ready than the Solicitor General to infer that Madison supported the "exist" view. In none of these cases is there evidence that Madison actually considered (or was aware of) the dates of the vacancies, so we are inclined to think his explicit embrace of the "arise" view in the Jackson episode constitutes the better evidence of Madison's view of the Clause's meaning.

D. Modern Practice Has Diverged From The Original Meaning, But Not To The Extent The Government Claims

The only plausible argument against the original "arise" interpretation of the Clause is the claim that there has been a long contrary practice. Under the usual account, the "arise" interpretation was abandoned in an opinion by Monroe's Attorney General William Wirt in 1823. See Hartnett, *supra*, at 401.

But that account downplays a great deal of contrary evidence. First, the executive branch subsequently issued opinions that contradicted Attorney General Wirt's opinion. One later Attorney General opinion declared, "[i]f vacancies are known to exist during the session of the Senate, and nominations are not then made, they cannot be filled by executive appointments in the recess of the Senate." 4 Op. Att'y Gen. 361, 363 (1845) (Mason).

Several other Attorneys General expressed similar views, suggesting that the word "happen" meant that even if a vacancy need not arise during the recess, it nonetheless had to continue by chance and not design. 2 Op. Att'y Gen. 525, 528 (1832) (Taney) ("If it falls out that, from death, inadvertence, or mistake, an office ... is, in the recess, found to be vacant ... the President may fill it . ... But vacancies are not *designedly* to be kept open by the President until the recess, for the purpose of avoiding the control of the Senate.") (emphasis in original); 3 Op. Att'y Gen 673, 674 (1841) (Legare) (acknowledging possibility that "happen" "impl[ies] something fortuitous and unexpected."); 4 Op. Att'y Gen. 523 (1846) (Mason); see also 3 Joseph Story, *Commentaries on the Constitution of the United States* 416-417, § 1553 (1st ed. 1833) ("The word 'happen' had relation to some casualty, not provided for by law"); Michael B. Rappaport, *Why Nonoriginalism Does Not Justify De-*

parting from the Original Meaning of the Recess Appointments Clause, at 19-20 (draft, Sep. 19, 2013).

On that view, a vacancy happened during the recess only if some unexpected occurrence caused the vacancy to go unfilled during the session. This view is inconsistent with the Solicitor General's account and its position in this case. There was nothing accidental or unexpected about these vacancies; nominations had been made during the session.

More importantly, the Senate has long contested the "exist" construction. In October of 1862, Attorney General Bates had written that he "might have serious doubts" about the "exist" interpretation as an original matter, but for the executive branch's contrary practice and the "unbroken acquiescence of the Senate." 10 Op. Att'y Gen. 356, 356. In December 1862, the Senate took issue with Bates's claim of acquiescence. After noting the increasing number of recess appointments, the Senate instructed the Judiciary Committee to investigate the constitutionality of recess appointments "which have not occurred during the recess of Congress, but which existed at the preceding session of Congress." Cong. Globe, 37th Cong., 3d Sess. 100 (Dec. 16, 1862).

On January 28, 1863, the Judiciary Committee concluded in strong terms that the practice was unconstitutional. Senator Howard reported: "We think the language too clear to admit of reasonable doubt, and that, upon principles of just construction, this period must have its inceptive point after one session has closed and before another session has begun." See S. Rep. No. 80, at 3 (37th Cong., 3d Sess.) (Jan. 28, 1863). The Committee argued that a "construction" based on continued practice should guide constitutional interpretation only "in considering the meaning and intent of a *doubtful* clause." *Id.* at 7 (empha-

sis in original). The Recess Appointments Clause was unambiguous, while Wirt's interpretation was "only the invention of a phrase not contained in the text, giving it an effect which the text itself, by the ordinary rules of interpretation, forbids. No instrument could long endure such experiments." *Id.* at 5.

The same day, the Senate moved to implement the Judiciary Committee's constitutional objections. It passed a statute that eliminated salaries for all recess appointments "which vacancy existed while the Senate was in session." Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646. In this statute, signed by President Abraham Lincoln, Congress endorsed the original "arise" view. Cong. Globe, 37th Cong., 3d Sess. 565 (January 28, 1863) (statements of Trumbull, Sherman, Fessenden); Rappaport, *Nonoriginalism*, *supra*, at 22-24. Shortly thereafter, two federal courts also rejected the executive branch's position.[5]

The pay statute's direct rejection of the "exist" view continued from 1863 to 1940, when it was amended to permit salaries to non-"arise" recess appointees in limited circumstances. Act of July 11, 1940, ch. 580, § 1761, 54 Stat. 751, 751, now codified at 5 U.S.C. § 5503. It is unclear whether the 1940 amendments reflect a twentieth-century change of heart on the constitutional question. The Senate report at that time noted only "that the law as it stands may cause serious injustice in preventing the payment of salary to those classes of appointees whose problems will be corrected by this amendment." S. Rep. No. 1079, at 2 (76th Cong., 1st sess. 1939); see

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[5] *Case of Dist. Attorney of United States*, 7 F. Cas. 731, 735-744 (E.D. Pa. 1868); Schenck v. Peay, 21 F. Cas. 672, 674-675 (C.C.E.D. Ark. 1869). But see *In re* Farrow, 3 F. 112 (C.C.N.D. Ga. 1880) (concluding that "exist" view was settled by practice).

also H. Rep. No. 2646, at 1 (76th Cong., 3d Sess. 1940) (existing statute "from a practical standpoint frequently creates difficulties"). And in requesting the amendments, the executive branch did not even mention the constitutional objections that had originally motivated the statute, nor did it cite the Senate Judiciary report. See *Letter from Attorney General Frank Murphy*, printed in S. Rep. No. 1079 at 2.

Significantly, even the new statute does not allow recess appointees to be paid in all circumstances, as would be the case if Congress had completely acquiesced in the executive practice. This suggests that the Senate has never accepted the "exist" interpretation across the board. Rappaport, *Nonoriginalism*, *supra*, at 33-35.

All of that said, it is true that a long string of executive branch practice, and arguably Congress's role in liberalizing the 1940 pay statute, have reflected a broader construction of the word "happen." Yet this Court has recognized the authority of modern practice only in cases of ambiguity. See *Pocket Veto Cases*, 279 U.S. 655, 689-90 (1929); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-12 (1952) (Frankfurter, J., concurring). The Court has generally rejected the proposition that practice may displace text and original meaning where it is clear. *Myers v. United States*, 272 U.S. 52, 174-175 (1956); *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970); *INS v. Chadha*, 462 U.S. 919, 944 (1983); *Bowsher v. Synar*, 478 U.S. 714, 723 (1986); *Printz v. United States*, 521 U.S. 898, 905 (1997).

Acceptance of the Solicitor General's view on the power of the President to make recess appointments to offices that became vacant while the Senate was in session would greatly increase the importance of modern practice for constitutional interpretation,

at the expense of text and early history. As will be seen, even the Solicitor General is unwilling to live with that approach on a consistent basis.

II. The Text Implies, and Long Practice Confirms, That Recesses Occur Between Sessions, Not During Them

The recent lower court decisions addressing the merits all conclude that Presidents may not use recess appointments to fill vacancies during so-called "intrasession recesses," regardless of how one interprets the word "happen." We acknowledge that the text of the Recess Appointment Clause standing alone does not *explicitly* preclude the concept of "intrasession recesses." Nonetheless, it is best read—in light of parliamentary practice and the purpose of the Clause—to *implicitly* foreclose such appointments. That this is the most natural meaning of the text is confirmed by long practice. If, however, the Court abandons the formal definition of "recess," it should likewise abandon a formal definition of "session," meaning that recess appointments will generally last for weeks, not years.

A. The Constitution's Text and Purpose Imply that Recess Appointments Are Limited To Intersession Recesses

It is something of a misnomer to refer to "intrasession" and "intersession" recesses, as the parties have done during this and other litigation. The reason that the Clause is best read as limited to so-called "intersession" recesses is because breaks in Senate proceedings while the Senate remains in session are not really recesses at all.

A natural reading of the text is that "the Recess" of the Senate and "the Session" of the Senate are mutually exclusive. Rappaport, *Original Meaning*, *supra*, at 1550. The Senate is either in session or in recess—not both. Recesses occur between sessions, not during them.[6] Although the ordinary language usage of "recess" can include breaks of any sort—such as a "recess" during the school day—the technical usage in Article II presumably comes from parliamentary practice. Parliament had the power to adjourn but not to end a session. The power to terminate a session, called "prorogation," belonged to the King. The Constitution gives both the adjournment power and the prorogation power to Congress. When the Constitution refers to a break during the Senate's session, it uses the word "adjourn." U.S. Const. art I, § 5, cl. 1 ("a smaller Number may adjourn from day to day"); *id.* cl. 4. ("Neither House, during the session of Congress, shall, without the Consent of the other, adjourn for more than three days . . ."); Rappaport, *Original Meaning*, *supra*, at 1557. Although the term was sometimes used loosely, as a legal matter, the term "recess" was typically reserved for the period of time between sessions.

In his discussion of the Clause in The Federalist, Hamilton noted that "the ordinary power of appointment is confined to the President and Senate jointly, and can therefore only be exercised *during the session* of the Senate"; and explained that the Clause was needed "as it would have been improper to oblige this body to be continually *in session* for the appoint-

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[6] The singular definite article "the" does not imply that there is only one recess between the two sessions of a two-year Congress. From the beginning, there have frequently been more than two sessions, and art II, § 3 explicitly contemplates special sessions, which necessarily will terminate the recess.

ment of officers and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay." *The Federalist No. 67*, *supra*, at 350 (Alexander Hamilton) (emphases added). Similarly, early statutes used the two terms exclusively. The First Congress passed a statute compensating a Senate clerk "two dollars per day during the session, with the like compensation to such clerk while he shall be necessarily employed in the recess." Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70, 71. Another statute, dealing with duties inspectors, said that "if the appointment ... shall not be made *during the present session of Congress*, the President may, and he is hereby empowered to make such appointments *during the recess of the Senate*, by granting commissions which shall expire at the end of their next session." Act of March 3, 1791, § 4, 1 Stat. 199, 200 (emphases added).

The Constitution's structure and the Clause's purpose reinforce the conclusion that the Clause's authority was limited to "intersession" recesses. For many decades, the recess between sessions tended to last for several months; adjournments during the session of the Senate, by contrast, tended to be exceedingly brief. During the short adjournments, the Senate could "compel the Attendance of absent Members" to attend to deal with important business, U.S. Const. art. I, § 5, cl. 1; see also 2 Story, *Commentaries*, *supra*, at 297, § 834 (noting that this power may be used when there has been no "no legal dissolution of the body").

Giving the President the power to make recess appointments during the long recesses, but not the short breaks, was a way of ensuring that offices could be filled "which it might be necessary for the public service to fill without delay," *The Federalist No. 67*,

supra, at 350 (Alexander Hamilton), without allowing undue circumvention of the advice-and-consent process, as Attorney General Randolph warned, 24 *Papers of Thomas Jefferson* 165. There was no good reason to dispense with advice and consent during short breaks.

Moreover, if the Recess Appointments Clause extends to breaks during the session, then the text contains no obvious limiting principle to stop the President from making a recess appointment during a three-day break, a weekend, or even overnight. To be sure, the executive branch currently represents that it has "agreed" not to do so. U.S. Br. 45. That is better than nothing. But see *United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly"). But the executive branch has sometimes suggested that the text would permit it to make appointments during shorter breaks, see *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __, 9 n. 13 (Jan. 6, 2012);[7] Brief for the United States at 14-18, *Mackie v. Clinton*, No. 93-32 (D.D.C. 1993), and it is not clear why three days is the limit. In 1903 President Theodore Roosevelt made 173 recess appointments during a purely nominal break between sessions at noon on December 8. *Special Session Is Merged into Regular*, N.Y. Times, Dec. 8, 1903, at 1. This assertion of power was controversial and questionable, but at least it was limited to brief breaks *between sessions*, which serves as a limiting principle.

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[7] Available at http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

It seems unlikely that the Framers would have given the President power to make recess appointments during all breaks in Senate business without explicitly establishing any lower bound on the length of those breaks. It is thus far more probable that the Clause's reference to "the Recess of the Senate," excluded periods when the Senate was in session, especially given that the Clause was so understood by readers at the time of enactment.

One final incongruity that would be created by the Solicitor General's view of the word "recess" is that "intrasession" recess appointments would last up to twice as long as traditional "intersession" appointments. Because the appointments last until "the end of the Senate's *next* Session," U.S. Const. art. II, § 2, cl. 3 (emphasis added), an appointment made during an intersession recess will last for one session, at most about a year. An appointment made during a session, by contrast, will last for the rest of that session, plus another whole session.

For example, if the President had made these appointments one day earlier, during the technical break between sessions, they would have lasted only one year, instead of the two that he achieved by timing the appointments for the day after the new session began. There is no apparent reason why the Framers would have wanted appointments made during intrasession breaks to last twice as long as those made when the Senate was out of session, and hence reason to doubt that an intrasession break can be a "recess" in the sense the term is used in the Clause.

B. Long Practice Confirms That Recess Appointments Are Limited To Intersession Recesses

Whatever ambiguity may survive the textual and structural evidence of the original meaning of the word "recess," in the Constitution, the intersession-only meaning of "recess" is confirmed by long practice, even by the executive branch. First, it is generally uncontested that there were no known intrasession recess appointments during the first 73 years under the Constitution. The Solicitor General claims that the absence of intrasession recess appointments does not reflect a constitutional consensus against such a power, but rather the fact that there were very few intrasession recesses exceeding three days. U.S. Br. 21-22. But the current "agreement" not to make recess appointments during three-day recesses had not been hatched at the time; so the Solicitor General does not fully explain the absence of any attempt to make any recess appointments during any of the thousands of short intrasession adjournments from the Founding until the Civil War.

The Solicitor General also overstates the extent of intrasession recess appointments starting with Andrew Johnson. The Solicitor General claims that Johnson made 57 intrasession recess appointments during 1867 and 1868. U.S. Br. 22. But most of these appointments can be explained under the traditional intersession view.

The confusion arises because of an unexpected special session of the Senate in 1867. In March of that year, Congress had been in session, and taken the unusual step of scheduling a mid-summer adjournment from March 30 until July 3 of that year. However, President Johnson called the Senate into special session the next day, on April 1, in a session that lasted until April 20. Congress then recessed until July 3. The Solicitor General takes the view that appointments made before July 3 are examples of "in-

trasession" recess appointments, presumably because Congress did not officially terminate its session on March 30. But it is more likely that "the end of the special session on April 20 constituted a genuine intersession recess that allowed recess appointments to be made under the intersession view. Under this view, the special session would have ended the ordinary session that had begun at the start of March." Rappaport, *Nonoriginalism*, *supra*, at 27. This accords with Thomas Jefferson's Senate Manual. See *A Manual of Parliamentary Practice: For the Use of the Senate of the United States* § LI (1812) ("The constitution authorizes the President 'on extraordinary occasions, to convene both Houses or either of them.' If convened by the President's proclamation, this must begin a new session, and of course determine the preceding one to have been a session.") (citation omitted). Similarly, there appears to be confusion about the break the Senate took in 1868 from July 27 to September 21, after acquitting President Johnson in his impeachment trial. The Solicitor General assumes that this was an "intrasession" recess, but the Congressional Globe indicates that "[t]he president pro tempore announced that the hour of twelve o'clock, fixed by the resolution of the two Houses *for closing the present session of Congress by a recess*, had arrived, and declared the Senate, in pursuance of the said resolution, adjourned until the third Monday in September next at twelve o'clock." Cong. Globe, 40th Cong., 2d Sess. 4518 (July 27, 1868); Rappaport, *Nonoriginalism*, *supra* at 28.

We do not know that every single example in the Solicitor General's brief can be similarly explained. But these examples are enough to show that the Solicitor General's view of the historical record is overstated, and that the Court should be wary of in-

ferring that a recess appointment broke historical tradition when there is no evidence that anybody at the time believed that to be happening.[8]

When the executive branch did finally address the question of intrasession recess appointments in 1901, Attorney General Knox dismissed Johnson's appointments, saying: "The public circumstances producing this state of affairs were unusual and involved results which should not be viewed as precedents." 23 Op. Att'y Gen. 599, 603 (1901). Instead, Knox explained, "an adjournment during a session of Congress means a merely temporary suspension of business ... whereas *the recess* means the period after the final adjournment of Congress for session, and before the next session begins." *Id.* at 601 (emphasis in original). The latter period "is *the recess* during which the President has power to fill vacancies" through recess appointment, and "intermediate temporary adjournments" are not. *Id.* That position was later abandoned by the Senate in 1905 and the Attorney General in 1921, in favor of a view that is equally inconsistent with the Solicitor General's current position.

C. Modern Practice Has Diverged From The Long Practice Under The Clause, But Not To The Extent The Government Claims

The Senate in 1905 and Attorney General Daugherty in 1921 concluded that it no longer made sense to interpret the term "recess" as referring to the period between the two formal "sessions" of a Con-

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[8] For example, many of the other appointments may have been valid under the "modified intersession view" discussed *infra* pp. 26-28.

gress. They agreed that "the recess" had to be a period long enough that the Senate was realistically unavailable to act on appointments. But the Senate and Attorney General did not abandon the fundamental concept that sessions and recesses are mutually exclusive. In adopting a functional definition of "recess," they adopted a functional definition of "session" as well—meaning that any recess ends one session and precedes another. See Michael Stern, *Burying the Multi-Session Recess Appointment Theory*, Point of Order Blog (May 3, 2012), http://www.pointoforder.com/2012/05/03/burying-the-multi-session-recess-appointment-theory/. Professor Rappaport calls this the "modified intersession view." Rappaport, *Nonoriginalism*, *supra*, at 29. By contrast, and without explanation, the Solicitor General insists on a functional definition of "recess" while retaining the formal definition of "session."

The Solicitor General claims that Attorney General "Daugherty rejected Knox's reasoning and concluded that intra-session recesses of sufficient length do trigger the Recess Appointments Clause." U.S. Br. 24-25 (citing 33 Op. Att'y Gen. 20, 21, 25 (1921)). Daugherty did indeed adopt a practical approach to determining *whether the Senate was in recess*, rather than a formal one that deferred to the Senate's nomenclature. But his opinion does not say that the Senate can be in recess and in session at the same time, and indeed his opinion repeatedly indicates that recess and session are mutually exclusive. E.g., 33 Op. Att'y Gen. at 21 ("the real question, as I view it, is whether in a *practical* sense the Senate is in session"); *id.* at 24 (recess is "the period of time when the Senate is not sitting in regular or extraordinary session"). So Daugherty's view actually entails the recognition of more recesses, but also more ses-

sions. Michael Stern, *Attorney General Daugherty and the "Intra-Session" Recess*, Point of Order Blog (March 30, 2012), http://www.pointoforder.com/2012/03/30/attorney-general-daugherty-and-the-intra-session-recess. There are no "intrasession recesses" under this view, but more numerous sessions broken by recesses.

Under Daugherty's view, recess appointments would generally be of significantly shorter duration, because they terminate at the end of the Senate's "next Session," U.S. Const. art. II, § 2, cl. 3, and each recess marks the end of a session. Indeed, recess appointments made in the few decades after Daugherty's opinion were held to expire relatively quickly, confirming that Daugherty's opinion reflects the "modified intersession view." Rappaport, *Nonoriginalism*, *supra*, at 31-32. For example, the recess appointment of John Esch in 1928, see U.S. Br. appx 10a, terminated after less than five months, rather than lasting another year as it would under the Solicitor General's view. Rappaport, *Nonoriginalism*, *supra*, at 31.

If this Court were to adopt Daugherty's view, the appointments at issue in this case would have expired after a few months, when the Senate adjourned for a period long enough to constitute a recess. Indeed, if a three-day break constitutes a recess and pro forma sessions are disregarded, as the Solicitor General proposes, the appointments expired on February 17, 2012, when the Senate took a 9-day break (punctuated by two pro forma sessions), 158 Cong. Rec. S1021 (daily ed. Feb. 17, 2012), which the Solicitor General would deem a recess.[9] In short, the Solicitor

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[9] That might entail reversing the decision below, since the NLRB decision was February 8, 2012. But it would entail af-

General wants to have it both ways: "recesses" are functional and may be as short as three days (with pro forma sessions ignored), but "sessions" are formal and last the full year without break. We perceive no logic in this inconsistency.

III. Under Modern Practice and Pragmatic Construction, The Senate's Pro Forma Sessions Interrupt A Recess

The third consistent approach to interpreting the Recess Appointments Clause for purposes of this dispute would rely on longstanding, but more recent practice. For many decades, without objection or controversy, both Houses of Congress have employed "pro forma" sessions for several constitutional purposes. To promote structural consistency, the Court should recognize "pro forma" sessions as no less effectual under the Recess Appointments Clause. The effect is to make the breaks between those sessions in January 2012 merely three-days long. No recess appointment has ever been made during an "intrasession" recess that short.

While the OLC opinion and some previous government briefs had been cagey about whether a recess appointment could be made even during a three-day intrasession recess, the Government's brief in this case explicitly concedes that "such short intrasession breaks—which do not genuinely render the Senate unavailable to provide advice and consent—are effectively *de minimis* and do not trigger the

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firming *NLRB v. Enter. Leasing Co. Se., LLC*, 722 F.3d 609, 615, 624 (4th Cir. 2013) (board decisions on April 18, and August 14, 2012) and *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 208, 218 (3d Cir. 2013) (recess appointment March 27, 2010; order August 26, 2011).

President's recess-appointment authority." U.S. Br. 18.

A. Under Modern Practice, Pro Forma Sessions Are Routinely Respected As Genuine

The Constitution provides that "each House may determine the rules of its proceedings," U.S. Const. art. I, § 5, cl. 2. Using that authority, the Senate frequently agrees that it will meet in "pro forma" session but not conduct business. On that day, one or more Senators will meet and typically promptly adjourn—though any Senator would be entitled to call for a quorum and summon the others, and the body may by unanimous consent transact business. The determination of the rules of each House is entrusted to that House alone, and it is suspect under the constitutional structure for the executive branch to assert a unilateral power to reject the Senate's chosen procedures as "a legal fiction." U.S. Br. 62.

In any event, the use of pro forma sessions to satisfy various constitutional purposes is soundly based in longstanding practice. To be sure, the use of pro forma sessions for the *avowed purpose* of thwarting recess appointments during adjournments dates back only until 2007, when the Senate (controlled by a Democratic majority) used pro forma sessions to preclude recess appointments by President Bush. Jeff VanDam, *The Kill Switch: The New Battle over Presidential Recess Appointments*, 107 Nw. U. L. Rev. 361, 375 (2012). But pro forma sessions have been used to satisfy other formal requirements of the Constitution throughout the twentieth century and have been embraced and accepted by both parties and both branches.

1. Pro Forma Sessions Have Satisfied the Adjournments Clause

The Constitution provides that "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." U.S. Const. art. I, § 5, cl. 4. Throughout the twentieth century, Congress has used pro forma sessions to satisfy this requirement. In 1929, the House entered an order to meet for several weeks on Mondays and Thursdays at pro forma sessions at which "there shall be nothing transacted except to convene and adjourn; no business whatever." 71 Cong. Rec. 3228-29 (1929) (Rep. Tilson). Similarly, in 1950, the Senate scheduled several pro forma sessions "without the transaction of business of any nature" on Tuesdays and Fridays. 96 Cong. Rec. 16,980 (1950). Other examples abound. See Resp. Br. Appx. B. These pro forma sessions allowed the Houses to satisfy their constitutional obligation to remain in session even though they chose not to transact substantive business. If pro forma sessions satisfy one House's duty to be available to the other House for legislative purposes, they should likewise establish the Senate's availability to receive nominations from the President.

The Solicitor General points out that in 1876, some Senators objected to a proposed series of pro forma sessions on constitutional grounds. U.S. Br. 60-61. Apart from its merits, see Resp. Br. 51-52, 57-58, this argument raises a problem of methodological consistency. If the Solicitor General wishes to take the view that early understandings of the Constitution trump subsequently-established practices, then it will have a hard time defending its recess appointments against the early understandings of the "arise"

and "intersession" issues. The Solicitor General cannot have it both ways.

2. Pro Forma Sessions Have Satisfied the Assembling Clause

Congress has also used pro forma sessions to satisfy the Constitution's requirement that "Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const. amend. XX, § 2. This practice dates back to at least 1980. See H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (Dec. 21, 1979) (pro forma sessions for both houses). Indeed, one of the pro forma sessions in early 2012 was necessary to comply with the Assembling Clause. 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (same).

It is not clear to us whether the Solicitor General disputes that the Assembling Clause is satisfied by such sessions, and if not, we do not understand the nature of its objection. U.S. Br. 61 n.60. But if such sessions were not valid for purposes of the Assembling Clause, why does the Solicitor General describe the period of time as a 20-day recess beginning on January 3, rather than a 38-day recess beginning on December 17? Apparently, the Solicitor General regards the pro forma session on January 3 as valid for purposes of the Assembling Clause. If so, why is it invalid for other comparable purposes, including the Recess Appointments Clause?

3. Pro Forma Sessions Have Been Used for Substantive Business

Finally, in recent years Congress has sometimes passed bills during pro forma sessions. For example, during a pro forma session on August 5, 2011, the Senate passed the Airport and Airway Extension Act of 2011. 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011). During a September 28, 2012 pro forma session, the House passed three bills. 158 Cong. Rec. H6285-86 (daily ed. Sept. 28, 2012). And on December 23, 2011, during a pro forma session, the Senate agreed to temporarily extend the payroll tax cut, which was the President's highest legislative priority at that time. See 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). The President signed all five bills into law. These pro forma sessions show that the Senate is capable of acting on business during its sequence of pro forma sessions. If it can vote on legislation, it can act on nominations.

The Solicitor General seems to recognize that it cannot logically maintain that these sessions were invalid. Instead it contends that if a pro forma session transacts business, it ceases to be a pro forma session. U.S. Br. 52-53. This is analogous to saying that wild animals cannot be captured, because if they are captured they are no longer wild.

The Solicitor General's only other response to this point is to deride these examples as "mere possibility." *Id.* at 52; see also *id.* ("A valid exercise of the recess-appointment power cannot be made to depend on a demonstration that the Senate would be *incapable* of resuming regular business during the relevant recess.") (emphasis in original). But that would have been enough for Attorney General Daugherty, who thought the President could make recess appoint-

ments only when there was "a real and genuine recess making it impossible for him to receive the advice and consent of the Senate." 33 Op. Att'y Gen. at 25. And on the issue of intrasession appointments, the Solicitor General is happy to rely on Daugherty's opinion. U.S. Br. 24-25.

B. As A Matter of Structure, Pro Forma Sessions Ought To Receive Uniform Treatment In Different Constitutional Provisions

Aside from its desultory argument that pro forma sessions do not in fact satisfy the Adjournments Clause or (maybe) the Assembly Clause, the Solicitor General's other claim is that pro forma sessions ought to be treated differently for some constitutional provisions than for others. It offers no persuasive basis for doing so. The general expectation is that "similarly phrased constitutional commands be read in pari materia." Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 794-95 (1999).

The Solicitor General's defense of this unusual position is brief:

> Even if the Court were to defer to the House and Senate's belief that a series of pro-forma sessions may satisfy their obligations to one another not to adjourn without the other's consent, such deference has no proper bearing on the meaning of the Recess Appointments Clause. Even assuming arguendo that the President has no direct interest in whether each House secures the other's consent for an adjournment (notwithstanding his role in the law-making process), he plainly has a direct interest in the balance that Article II strikes be-

> tween his need to secure the Senate's advice and consent for appointments at certain times, and his unilateral power to make temporary appointments when the Senate is not available.

U.S. Br. 61-62. This is wrong on two counts.

First, the pro forma sessions can be respected not simply out of "defer[ence]" to the House and Senate, but out of an independent judgment that modern practice, especially practice by coordinate branches of government, is relevant to constitutional meaning.

Second, as the Solicitor General almost acknowledges, the President's "interest" in each constitutional rule is somewhat similar. The President has an interest in the Adjournments Clause and the Assembly Clause both because of "his role in the lawmaking process," U.S. Br. 62, and because the President frequently may wish to exercise constitutional powers that require Congress's cooperation. He certainly had an "interest" in treating the pro forma session on Dec. 23, 2011, as constitutionally legitimate, in view of the fact that the Senate passed legislation that he signed into law without any qualm about the legitimacy of the pro forma session.

CONCLUSION

Each of the three approaches discussed here emphasizes a different set of interpretive tools. There are arguments for adopting any one of them. But none of these methodological approaches, consistently pursued, can ultimately sustain the Solicitor General's theory of the Recess Appointments Clause.

Respectfully submitted.

MICHAEL W. MCCONNELL
Counsel of Record
559 Nathan Abbott Way
Stanford, CA 94305
(650) 736-1326
mcconnell@law.stanford.edu
WILLIAM BAUDE
1111 E. 60th St.
Chicago, IL 60637
Counsel for Amici Curiae

NOVEMBER 2013

APPENDIX

APPENDIX A

LIST OF AMICI CURIAE

The following amici curiae join this brief. Positions and institutions are listed for identification purposes only.

William Baude — Neubauer Family Assistant Professor of Law (Jan. 1, 2014), University of Chicago Law School

Samuel Bray — Assistant Professor of Law, UCLA School of Law

Dale Carpenter — Earl R. Larson Professor of Civil Rights and Civil Liberties Law, University of Minnesota Law School

Nathan Chapman — Assistant Professor of Law, University of Georgia Law School

John C. Eastman — Henry Salvatori Professor of Law and Community Service, Chapman University, Dale E. Fowler School of Law

Richard Epstein — Laurence A. Tisch Professor of Law, New York University School of Law

Michael Greve — Professor of Law, George Mason University School of Law

Joshua Hawley — Associate Professor of Law, University of Missouri School of Law

Eugene Kontorovich — Professor of Law, Northwestern University Law School

Kurt T. Lash — Guy Raymond Jones Chair in Law, University of Illinois College of Law

Michael McConnell — Richard and Frances Mallery Professor of Law, Stanford Law School

Saikrishna Prakash — James Monroe Distinguished Professor of Law, Horace W. Goldsmith Research Professor, University of Virginia Law School

Nicholas Quinn Rosenkranz — Professor of Law, Georgetown University Law Center

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-1281

IN THE
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NOEL CANNING, A DIVISION OF
THE NOEL CORP., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING

HAROLD P. COXSON
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
1909 K Street
Suite 1000
Washington, D.C. 20006
(202) 887-0855
hal.coxson@odnss.com

CHRISTOPHER R. COXSON
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
10 Madison Avenue
Suite 400
Morristown, NJ 07960
(973) 656-1600
christopher.coxson
@odnss.com

ARTHUR B. SMITH, JR.
Counsel of Record
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
155 North Wacker Drive
Suite 4300
Chicago, IL 60606
(312) 558-1230
arthur.smith@odnss.com

CHRISTOPHER C. MURRAY
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
111 Monument Circle
Suite 4600
Indianapolis, IN 46204
(317) 916-1300
christopher.murray
@odnss.com

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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IN THE

Supreme Court of the United States

No. 12-1281

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NOEL CANNING, A DIVISION OF
THE NOEL CORP., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING

INTEREST OF THE *AMICUS CURIAE* [1]

The Council on Labor Law Equality (COLLE) is a trade association founded over 30 years ago for the purpose of monitoring and commenting on developments in the interpretation of the National Labor Relations Act (NLRA). Through the filing of amicus briefs and other forms of participation, COLLE

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), *amicus* states that letters reflecting the parties' blanket consent to the filing of amicus briefs have been filed with the Clerk's office.

provides a specialized and continuing business community effort to maintain a balanced approach in the formulation of national labor policy on issues that affect a broad cross-section of American industry. COLLE is the nation's only brief-writing association devoted exclusively to issues arising under the NLRA and in recent decades has filed amicus briefs in nearly every significant labor case before the NLRB, the federal courts of appeals, and the U.S. Supreme Court.

COLLE represents employers in virtually every business sector, all of whom are subject to the NLRA. COLLE members have a vital interest in the proper functioning of the NLRB.

Respondent Noel Canning's brief provides compelling reasons to affirm the judgment of the D.C. Circuit. The purpose of this brief is to provide additional background information emphasizing the third argument presented – Separation of Powers, which precludes the President from overriding the expressed will of the Senate not to recess but to remain in pro forma sessions every three days. Allowing the President the unchecked authority to impose the will of the Executive Branch by ignoring the advice and consent function of the Senate would lead to future abuse of the recess-appointment power. As set forth below, COLLE has a vital interest consistent with its charter and underlying purpose to help ensure that appointments to the NLRB are fair, balanced, and carefully considered by the Senate.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case rests solely on the basis of what constitutes "the Recess" under the Recess Appointments Clause of the Constitution. The D.C. Circuit ruled below that for purposes of the Recess Appointments

Clause, "the Recess" means only those recesses that occur between enumerated sessions of the Senate, i.e., so-called "intersession" periods between the close of one session and the opening of the next session.[2] The D.C. Circuit also ruled that the vacancies to be filled by recess appointments must arise during the recess. While COLLE agrees with those rulings and the arguments advanced by Respondent Noel Canning supporting those rulings, COLLE submits that the President's recess appointments in question are invalid for a far simpler and more compelling reason. The Senate was in session, not in recess, at the time the recess appointments were made. A decision that upholds the rule that Separation of Powers prevents the President from unilaterally declaring the Senate in "recess" against its will, in contrast, could render resolution of those broader questions unnecessary here.

In addition to the textual limitations on the Recess Appointments Clause, it is fundamental that the Senate must actually be in recess when recess appointments are made. The January 4, 2012 appointments did not meet this fundamental requirement and contravened longstanding Executive Branch practice that a break of less than three days is not "the Recess" mandated by the Recess

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[2] Subsequently, the Third Circuit reached the same conclusion regarding an earlier recess appointment to the Board, holding that intra-session appointments are unconstitutional and explicitly rejecting the Government's contention that the President may unilaterally disregard pro forma sessions of the Senate. *See NLRB. v. New Vista Nursing & Rehab.*, 719 F.3d 203, 218-244 (3d Cir. 2013). Subsequently, the Fourth Circuit agreed with the *Noel Canning* and *New Vista* courts that the President's recess appointments were constitutionally invalid. *NLRB v. Enter. Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013).

Appointments Clause. As the Government conceded in its petition, "the Executive has long understood that [three day] intra-session breaks . . . do not trigger the President's recess-appointment authority." Pet. 21. Indeed, the Executive Branch has long abided by that simple rule as expressed in the Constitution that the Recess Appointments Clause empowers the President to make recess appointments only if, at a minimum, the Senate "adjourn[s] for more than three days" under the Adjournment Clause. U.S. Const. art I, § 5, cl.4. This longstanding rule should be dispositive.

At the time the recess appointments in question were made, the Senate had convened the day before to commence the Second Session of the 112th Congress, and convened again two days later. Clearly, the Senate was not in recess and was available to consider the nominations of the President's choosing. Therefore, by any measure the President's January 4, 2012 appointments were invalid. The President may not simply ignore the Senate's attestations that it is in session on certain days because in his view it is "unavailable to act." The Government's arguments to the contrary are without merit. Its alternative test – that the President had the authority under his obligation to fully execute the laws of the United States - would eviscerate the Senate's advice and consent power, and would authorize him to make recess appointments whenever he chose. That cannot be so.

Affirming the decision of the D.C. Circuit below on these grounds would eliminate the Government's concern that restricting recess appointments to only inter-session periods or only when vacancies arise during the recess would lead to a constitutional crisis. Indeed, it would merely affirm what the Government

already concedes – that the Senate must be in a recess of longer than three days to trigger the President's recess appointment authority. It would re-establish a bright line standard for recess appointments which originates from the Founders and would prevent future attempts by the Executive Branch to usurp the Senate's advice and consent power by overriding internal Senate rules and procedures to satisfy the unyielding desire of the President to insist upon his nominees. It may even result in achieving one of the objectives of the "advice and consent" function – encouraging negotiation and compromise in the selection of nominees where the Senate is not in accord with the President's selection. The Government's position would eliminate the President's incentive to negotiate and compromise. Also, as history demonstrates, affirming the D.C. Circuit on these grounds would not unduly disrupt the operations of the NLRB. According to the Board's own website, following this Court's ruling in *New Process Steel*, the Board, which was then comprised of three Board members, issued new decisions in approximately 100 cases out of approximately 550 two-member Board decisions the vast majority of which were decided within a few months. (*See* http://www.nlrb.gov/news-outreach/fact-sheets/background-materials-two-member-board-decisions). Here, the Board's review would be of significantly fewer cases, and it will have the advantage of a confirmed full five-Member complement of Board Members along with a newly confirmed General Counsel.

If the President lacked the power (and he did) to override the Senate's decisions regarding its own internal procedures without violating the constitutional Separation of Powers and the parameters of the

Recess Appointments Clause, the appointments to the NLRB on January 4, 2012 were unconstitutional, and the Board's actions in this case were *ultra vires* since the Board lacked a quorum.

ARGUMENT

I. THE PRESIDENT'S EXERCISE OF RECESS-APPOINTMENT POWERS OVERRIDING THE RULES OF THE SENATE WHEN THE SENATE, BY UNANIMOUS CONSENT, WAS IN *PRO FORMA* SESSIONS MEETING EVERY THREE DAYS, VIOLATES THE SEPARATION OF POWERS AND IS CONSTITUTIONALLY INVALID.

The Appointments Clause of the U.S. Constitution requires the President to obtain the advice and consent of the Senate before making appointments to certain high-ranking positions in the Executive Branch. U.S. Const. art. II, § 2, cl. 2. The Framers, wary of potential "manipulation of official appointments" by the Executive, *Freytag v. Comm'r*, 501 U.S. 868, 883 (1991) (citation omitted), deliberately withheld from the President the ability to appoint officers unilaterally – except for certain inferior officers, and then only with Congress's consent. As the Court stated in *Freytag*, "The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." *Id.* at 804. *See The Federalist* No. 76, at 455-56 (A. Hamilton) (Clinton Rossiter ed., 2003). Requiring the Senate's advice and consent for appointments, they recognized, would "serv[e] both to curb Executive abuses of the appointment power and 'to promote a judicious choice of [persons] for filling the

offices of the union." *Edmond v. United States*, 520 U.S. 651, 659 (1997). The Framers thus gave the Senate an absolute veto over appointments, making its Advice and Consent a condition precedent to a commission. U.S. Const. art. II, § 2, cl. 2.

The Recess Appointments Clause immediately follows the Appointments Clause and authorizes the President "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art II, § 2, cl. 3. That power has limits, one of which is that the Senate must be in recess for more than three days – in other words, actually in recess – before recess appointments are available. U.S. Const. art. I, § 5, cl. 4. In that regard, the Adjournments Clause is a constraint on the Recess Appointments Clause. Even the Executive has urged that it makes "eminent sense" to apply the three-day requirement in construing the Recess Appointments Clause. *See* Reply Br. for Intervener United States at 21, *Evans v. Stephens*, 407 F.3d 1272 (11th Cir. 2005) (en banc) (No. 02-16424), 2004 WL 3589822. *See also Wright v. United States*, 302 U.S. 583, 589-90 (1938) (Pocket Veto Clause).

That bedrock principle has very deep roots, and has never been questioned by the Executive until now. Indeed, Attorney General Daugherty scoffed at the notion that anyone would contest it. As Daugherty wrote: If the Senate has not adjourned for more than three days, "no one ... would for a moment contend that the Senate is not in session." *Executive Power – Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921). The current Administration reiterated that view three years ago in this Court. *See* Letter from Elena Kagan, Solicitor General, to William K. Sutter, Clerk, Supreme Court of the United States 3 (Apr. 26, 2010),

New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010) (No. 08-1457) (Senate "may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over a lengthy period.").

This case arises from the President's disputed "recess" appointment of three nominees to the National Labor Relations Board[3] on January 4, 2012 without the advice and consent of the Senate and without the Senate being in recess. On January 3, 2012, the first session of the 112th Congress closed. At that time, the tenure of earlier NLRB "recess appointee" Craig Becker ended automatically with the close of the session.[4] The expiration of his term left the Board with only two members, thus lacking a quorum. The next day, January 4, 2012, the President announced the appointment of Board Members Sharon Block, Terence Flynn, and Richard Griffin. At the time, the Senate was in session. The Senate had neither sought nor received the consent of the House to recess or adjourn, since it was the Senate's intent to remain in pro forma session meeting every three days.

Article I empowers "[e]ach House" of Congress to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. The Senate's discretion to determine

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[3] At the same time, on January 4, 2012, the President announced the appointment of Richard Cordray to the Consumer Financial Protection Bureau.

[4] The Third Circuit joined the D.C. Circuit in holding that the Recess Appointments Clause does not allow "intra-session" recess appointments, and therefore Member Becker's March 2010 intra-session recess appointment was unconstitutional. *See New Vista*, 719 F.3d at 244. Subsequently, the Fourth Circuit agreed with the *Noel Canning* and *New Vista* courts that the President's recess appointments were constitutionally invalid. *Enter. Leasing*, 722 F.3d 609.

its own rules and, subject to few limitations,[5] how and when to schedule its own sessions is absolute. *See, e.g.*, Thomas Jefferson, *Opinion on Constitutionality of the Residence Bill* (July 15, 1790), reprinted in *17 The Papers of Thomas Jefferson 194*, 195 (1965). In fact, as a noted commentator observed, even the "humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority." *2 Joseph Story, Commentaries on the Constitution of the United States* § 835, at 298 (1833). *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). Article I clearly provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting." U.S. Const. art. I, §5, cl. 4.

From December 17, 2011, to January 23, 2012, the Senate met in "pro forma"[6] sessions every three days to satisfy the constitutional requirement under the

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[5] The only constraints on the Senate's scheduling are specifically enumerated: It must meet once a year on January 3 (or another date Congress chooses) U.S. CONST. amend. XX, § 2, and when called into special session by the President, *id.* art. II, § 3. And, once convened, the Senate cannot adjourn for more than three days (or to another place) without the consent of the House. *Id.* art. I, § 5, cl. 4.

[6] "Pro forma" sessions generally refer to the requirements of the Adjournments Clause, such that "the term pro forma describes the reason for holding the session, [but] does not distinguish the nature of the session itself. . . . A pro forma session is not materially different from other Senate sessions." 158 Cong. Rec. S5954 (daily ed. Aug. 2, 2012) (Statement of Sen. McConnell, incorporating Christopher M. Davis, *Cong. Research Serv.*, Certain Questions Related To Pro Forma Sessions Of The Senate (Mar. 8, 2012)).

Adjournments Clause that it not adjourn for longer than 3 days without the consent of the House of Representatives. *See* U.S. Const. art I, § 5, cl. 4. Although the Senate's scheduling order of December 17, 2011 provided that there would be "no business conducted" at these sessions, 157 Cong. Rec. S8783-84 (daily ed. Dec. 17, 2011), in fact the Senate did conduct business during these sessions: at the President's request, on December 23, 2011, the Senate passed a bill extending the payroll tax cut for two months, *id.* at S8789-03 (daily ed. Dec. 23, 2011). And the President signed the bill. Indeed, the day before the President announced the "recess" appointments, the Senate convened to start the second session of the 112th Congress as required by the Twentieth Amendment. *See* 158 Cong. Rec. S1-01 (daily ed. Jan. 3, 2012).[7]

A basis on which the Executive has impugned the will of the Senate to remain in session[8] is that the order scheduling the three day sessions labeled them "pro forma . . . with no business conducted." 157 Cong. Rec. S8783-07. The Government's brief makes much of that language in the Senate's scheduling order, but

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[7] The Twentieth Amendment requires that "[t]he Congress shall assemble at least once in every year, and such meeting shall begin at noon on the third day of January, unless they shall by law appoint a different day." U.S. CONST. amend XX, § 2.

[8] It is worthy of note, that during the presidency of George W. Bush, the Senate, under the direction of Senate Majority Leader Harry Reid, refused to recess the Senate for over two years in order to block recess appointments from the Executive. Indeed, the President did not attempt to arrogate the rules of the Senate by simply making recess appointments. *See, e.g.*, 154 Cong. Rec. S8077-04 (daily ed. Aug. 1, 2008). Senate Majority Leader Reid made clear that the Senate was not entering a recess. 154 Cong. Rec. S7554-02 (daily ed. July 28, 2008) ("[T]here will be no recess. We will meet every third day pro forma.").

that description is not dispositive as the Government would have the Court believe. In fact, it bears only on the Senate's *intentions* whether to do business, not its *ability* to do so. The Senate could have chosen to conduct business even "without notice." Senate Rule V(1), *Senate Manual*, S.Doc. No. 112-1, at 5 (2011). And, in fact, the Senate had done so during identical pro forma sessions five months before the January 4 appointments and again during the January 3 and 6 meetings, at the President's own request.[9] It was not the "unavailability" of the Senate to act which motivated these recess appointments, it was the President's reluctance to accept the Senate's likely answer.

Article I empowers "[e]ach House" of Congress to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. As this Court has long held, the choice of each Chamber's rules and procedures is for the members of that House alone. *United States v. Ballin*, 144 U.S. 1, 5 (1892). The Senate not only may prescribe when it will meet, but also has the final authority to determine whether it has done so. The attestation of the presiding officer that it has done so is controlling. *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 670-80 (1892). Here, the Senate itself determined that it would meet on the record on January 3, 6, and other days, 157 Cong. Rec. at S8783 – 84, and its records confirm that it did so, *see e.g.*, 158 Cong. Rec. at S1-01 (2012). The President's

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[9] *See* 157 Cong. Rec. S5297-03 (Aug. 5, 2011) (passing Public Law No. 112-27, 125 Stat. 270 (2011)); 157 Cong. Rec. S8789-03 (Dec. 23, 2011) (passing Public Law No. 112-78, 125 Stat. 1280 (2011)); *see also* Daily Comp. Pres. Docs. 2011 DCPD No. 00962, at 1-2 (Dec. 22, 2011) (urging Senate, which had already commenced pro forma sessions, to pass Public Law No. 112-78).

determination that those sessions were "nullities" is belied by the Senate's account of its own actions.

Indeed, when the President announced these recess appointments, he had waited less than three weeks for Senate approval of two of the nominees before resorting to recess appointments (*see* 157 Cong. Rec. S8691-05 (Dec. 15, 2011)(receiving nominations of Sharon Block and Richard Griffin, Jr. to the NLRB)). The President demonstrated his impatience by announcing another recess appointment also on January 4, 2012, not for the reason that the Senate was unavailable, but because it had announced its opposition to his selection and he "refuse[d] to take no for an answer." Daily Comp. Pres. Docs. 2012 DCPD No. 00004 at 3 (Jan. 4, 2012). His decision to announce his recess appointments of a controversial slate of NLRB nominees on January 4, 2012, ostensibly was based on his unilateral determination that the Senate was "unavailable" simply to rubber-stamp his nominations.[10]

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[10] As if the President's actions were not enough to render his recess appointments unconstitutional, the Executive has made clear that it considers the court of appeals' decision in this case merely advisory, even with respect to the Board itself. Statements and actions of the President's Press Secretary Jay Carney and those of NLRB Chairman Pearce following the decision of the D.C. Circuit below ignore the impact of the decision. Both said that the decision below, ruling that the President's recess appointments are unconstitutional, "applies to only one specific case" and has no bearing on the Board's ability to act in others outside the D.C. Circuit. Therefore, the Board ignored the *Noel Canning* decision and kept digging the hole deeper by deciding cases with an unconstitutional Board. *See* Statement by NLRB Chairman Pearce on Recess Appointment Ruling (Jan. 25, 2013) *available at* http://www.nlrb.gov/news-outreach/news-releases/statement-chairman-pearce-recess-appointment-ruling (Pearce Statement); White House, Press Briefing by

The President was advised, poorly as it turns out, that regardless of Senate rules and procedures, and the lessons of history dating back to the Founders, he alone had the absolute unilateral power to decide entirely within his sole and unfettered discretion when the Senate was in "recess" incapable of receiving and acting on his nominations, even where by unanimous consent the Senate had decided to remain in "pro forma" sessions meeting every three days. *See Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __ (Jan. 6, 2012) *available at* http://www.justice.gov/olc/memoranda-opinions/index.php. But this cannot be so. Otherwise, by giving the President absolute power to evade the Recess Appointments Clause by deter-mining unilaterally, at his discretion, when the Senate is in recess and unavailable to receive nominations – authority which the Constitution clearly withholds and which no President has ever tried in the past – would undermine constitutional separation of powers.

Neither is the Government's argument convincing that the Senate was "functionally" in recess when the Senate itself had unequivocally declared that it was in session. In fact, the Senate confirmed a number of presidential nominees by unanimous consent the same day that it scheduled the pro forma sessions in question here. 157 Cong. Rec. S8769-03 (daily ed. Dec. 17, 2011). Thus, it is clear that the Senate can (and has) fulfilled

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Press Secretary Jay Carney (Jan. 25, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/01/25/press-briefing-press-secretary-jay-carney-1252013 (D.C. Circuit's decision "does not have any impact. . . on [the Board's] operations or functions, or on the board itself"). The Executive should not now be heard that there is a burden in reconsidering previously issued invalid decisions. *C.f. New Process Steel*, 560 U.S. 674.

its advice and consent function during pro-forma sessions, just as it can fulfill other core legislative functions.

Finally, the contention that the President's recess appointments were valid in order to fulfill the Take Care Clause, U.S. Const. art. II, § 3, would allow the President to define the scope of his own appointment powers which the D.C. Circuit said would eviscerate the Constitution's Separation of Powers. *See* Pet. App. 29a. *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Under the National Labor Relations Act, the Board is to "consist of five . . . members, appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a). The Board is required to have three validly appointed members to have a quorum. *Id.* § 153(b). Absent a quorum, the Board is without power to act. *New Process Steel*, 560 U.S. at ___, 130 S.Ct. at 2644-45.

Here, the Executive circumvented the Senate's advice and consent function by making putative recess appointments which were constitutionally invalid. The result, as earlier in *New Process Steel*, was that the Board lacked a quorum to act and hence its decisions were ultra vires and invalid.

To uphold these recess appointments, whether on the basis of textual interpretations of the term "the Recess" in the Recess Appointments Clause, or on the basis that the Executive has the unchecked discretion to circumvent the will of the Senate and override its rules, would convenience the President, but would do serious harm to the Founders' concept of Separation of Powers. It would allow the President to usurp two powers that the Constitution confers explicitly and

exclusively on the Senate – the absolute veto power over appointments with the advice and consent of the Senate and the authority to set its own rules. The result would severely and irreparably undermine the doctrine of separation of powers. *See Plaut,* 514 U.S. at 239 ("The doctrine of separation of powers is a . . . prophylactic device, establishing high walls and clear distinctions."). *See also Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935) ("The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.").

The constitutional text, structure, and history of recess appointments make clear that the decision of the D.C. Circuit below, and the subsequent decisions of the Third and Fourth Circuits, were correct. In this regard, it is unnecessary to decide this case on the basis of textual interpretations of the constitutional definition of "the Recess" or whether recess appointments only are available for vacancies that arise during "the Recess," although COLLE supports Respondent Noel Canning's arguments in that regard. Rather, COLLE urges the Court to uphold the Constitutional doctrine of Separation of Powers by declaring that the President cannot unilaterally determine that the Senate is in a "functional" recess when, in fact, it has determined under Senate rules that it is in session - pro forma or otherwise. A contrary ruling would open the floodgates for the Executive to announce recess appointments and end run the Senate, usurping its role of advice and consent whenever the Executive is dissatisfied with the response of the Senate to its nominations.

II. AFFIRMING THE DECISION OF THE D.C. CIRCUIT BASED ON SEPARATION OF POWERS WILL NEITHER CREATE A CONSTITUTIONAL CRISIS NOR UNDULY DISRUPT THE FUNCTIONS OF THE NATIONAL LABOR RELATIONS BOARD.

The Government contends that affirming the D.C. Circuit's decision would "threaten[] a significant disruption" to NLRB operations "call[ing] into question every final decision of the Board since January 4, 2012." Pet. 30. The Government's assertion is specious, ignoring its own recent history and expeditious handling of returned decisions following this Court's ruling in *New Process Steel*.

The Board's website contains discussion of statistics related to the two-member Board decisions that were at issue in *New Process Steel*. (*See* http://www.nlrb.gov/news-outreach/fact-sheets/background- materials-two-member-board-decisions). Specifically, the Board's website provides, as follows:

> From January 2008 to March 2010, the Board operated with three of its five seats vacant. The two remaining members . . . issued about 550 decisions . . . Dozens of the decisions were appealed to federal courts on the grounds that the two-member Board did not have the authority to act. On June 17, 2010, a divided Supreme Court ruled in *New Process Steel vs. the NLRB* that the two-member Board lacked authority to decide cases. *About 100 two-member decisions were returned to the Board, either by the federal courts or by the parties themselves, and new decisions were issued*. . . .[N]early all of the remaining cases have closed through the Board's normal processes.

Id. (emphasis added)

Of the approximately 100 decisions that were returned to the Board once it attained a third member, approximately 75% were ratified or "rubber-stamped" endorsements of the prior two-member decision. The ratified cases contain the following refrain (or something very similar to it):

> The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order to the extent and for the reasons stated in the decision reported at . . . , which is incorporated by reference.

See, e.g., *ADF, Inc.*, 355 NLRB No. 62 (2010); *Trump Marina Associates*, LLC, 355 NLRB No. 107 (2010); *The New York Presbyterian Hospital*, 355 NLRB No. 126 (2010).

It is also important to note that in approximately 90% of the returned cases, the three-member Board issued new decisions within five months.[11]

With this history in mind, there is no reason to doubt that should this Court affirm the D.C. Circuit's decision below, the current confirmed full five-Member Board also should have no problem quickly issuing new decisions. There have been approximately 436 published and unpublished decisions issued by the invalidly recess-appointed Board since January 4, 2012. (*See*

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[11] The Board's discussion on its website of the disposition of the two-member Board decisions following the *New Process Steel* decision contains links to the respective dockets for each of those decisions. A review of the dockets reveals that of the approximately 100 returned two-member Board cases, 56 new decisions were issued in August 2010 and 32 new decisions were issued before the end of December 2012. As stated above, approximately 75% of those decisions were short form "rubber stamp" adoptions of the Board's earlier decisions.

http://www.nlrb.gov/cases-decisions/board-decisions).[12] The number of such cases is significantly fewer than the number of published decisions invalidated following *New Process Steel*.

Also, the Government should not now benefit from its own intransigence by ignoring the ruling of the D.C. Circuit below. The invalid recess Board simply continued to issue decisions when it was on notice that those decisions would be *ultra vires*. It should not be now heard to justify its actions based on the inconvenience of having to reconsider those decisions.

Likewise, the Executive's argument that to affirm the D.C. Circuit's decision would create a constitutional crisis based on its extensive citation of previous inter-session recess appointments is unavailing. This Court's ruling simply that recess appointments – whether intra-session or inter-session – must at minimum be made during a recess declared by the Senate, would be consistent with the

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[12] This number was determined based on a count of the published and unpublished decisions on the Board's website for the period January 2012 (when the challenged recess appointments were made) through July 30, 2013 (when the current five-member Board was properly appointed and confirmed by the Senate). *See also* www.chamberlitigation.com/recess-appointments-litigation-resource-page. The Board's number of cases dating back to the unconstitutional recess appointment of former Board member Craig Becker may be greater. In its petition, the Government contended: "because many of the Board's members have been recess-appointed during the past decade, [the D.C. Circuit's decision] could also place earlier orders in jeopardy. The National Labor Relations Act places no time limit on petitions for review and allows such petitions to be brought in either a regional circuit *or* the D.C. Circuit . . . .Thus, the potential effects of the decision below are limited by neither time nor geography." Pet. 30. There is no need to consider that period of invalidity in the context of this case.

views of the Founders on separation of powers, and would reaffirm the bright line test for all future recess appointments.

CONCLUSION

For all of the reasons set forth above and in Respondent Noel Canning's brief, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

HAROLD P. COXSON
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
1909 K Street
Suite 1000
Washington, D.C. 20006
(202) 887-0855
hal.coxson@odnss.com

CHRISTOPHER R. COXSON
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
10 Madison Avenue
Suite 400
Morristown, NJ 07960
(973) 656-1600
christopher.coxson@odnss.com

ARTHUR B. SMITH, JR.
Counsel of Record
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
155 North Wacker Drive
Suite 4300
Chicago, IL 60606
(312) 558-1230
arthur.smith@odnss.com

CHRISTOPHER C. MURRAY
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
111 Monument Circle
Suite 4600
Indianapolis, IN 46204
(317) 916-1300
christopher.murray@odnss.com

Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

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AND
BRIEFS

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IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF DAYCON PRODUCTS COMPANY, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING

JAY P. KRUPIN
Counsel of Record
ANDREW M. GROSSMAN
LEE A. CASEY
BAKERHOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1700
jkrupin@bakerlaw.com

Counsel for the Amicus Curiae

Library of Congress
Law Library

QUESTIONS PRESENTED

1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate.

2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

3. Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions.

RULE 29.6 DISCLOSURE

Daycon Products Company, Inc., is a wholly owned subsidiary of P4, Inc., a Maryland corporation, and no publicly held corporation owns 10 percent or more of P4, Inc. Daycon is a manufacturer and distributor of cleaning and maintenance supplies.

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INTEREST OF THE *AMICUS CURIAE*[1]

The *amicus curiae* is petitioner in *Daycon Products Company, Inc., v. National Labor Relations Board*, No. 12-1445, which challenges Board action on essentially the same grounds as the instant case. The only relevant distinction is that Daycon, like hundreds of other employers, was subject to Board action tainted by the unlawful "recess" appointment of Craig Becker, rather than the three Members who were "recess" appointed while the Senate was convening in *pro forma* sessions in January 2012.

While Daycon supports Respondent Noel Canning's position that the decision below should be affirmed, it specifically urges the Court to rule definitively on either or both of the two alternative holdings of the decision below. Failure to do so would leave unresolved the issues raised in its case and others challenging Board action reliant on Becker's lawful appointment. Whether or not the question of the President's authority to make "recess" appointments while the Senate convenes in *pro forma* sessions presents a narrower basis of decision than the two holdings of the decision below—as explained herein, it does not—the Court will inevitably be

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[1] Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae*, or his counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

forced to confront the issues implicated by those holdings in a future case, such as Daycon's or others now pending before the courts of appeals. *See, e.g., NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203 (3d Cir. 2013) (holding invalid orders reliant on Becker's lawful appointment). For the sake of judicial economy, party economy, and the vitality of the Constitution's separation of powers, it should do so here.

INTRODUCTION AND SUMMARY OF ARGUMENT

The *amicus curiae* agrees with the Respondent that the decision below should be affirmed and, rather than present duplicative briefing on that point, joins the Respondent's arguments. This brief's focus, instead, is on the Court's exercise of its discretion to choose from among three possible grounds of decision, corresponding with the three "Questions Presented" at the outset of the Petitioner's brief. Although any of the three would be sufficient to affirm the decision below—*i.e.*, each provides an independent basis to conclude that the "recess" appointments at issue were constitutionally invalid—only two could lay to rest the controversy over the "recess" appointment of Craig Becker to the Board, an issue raised in numerous pending cases, and resolve ongoing conflicts of authority among the circuits. Those two are the alternative holdings of the decision below concerning the scope of the President's recess-appointments power: whether that power may be exercised during intrasession recesses and whether it

may be used to fill vacancies predating the present recess.

The third possible ground of decision—the constitutional status of the Senate's convening in *pro forma* sessions—would not alone resolve the lawfulness of Becker's appointment and would leave in place circuit splits on the two other holdings. Becker's appointment has already been declared invalid by one court of appeals, and a case challenging his appointment (the *amicus curiae's*) is already before this Court. And the circuit splits mean that government action undertaken by a recess appointee that is valid in some parts of the country would be invalid in others, causing substantial legal uncertainty and dislocation. The Court will almost certainly have to speak on the scope of the President's recess-appointments power. As possible, it should do so in this case, rather than base its decision on an issue that provides little or no guidance to the government officials, lower courts, and subjects of potentially unlawful government action embroiled in this ongoing dispute.

There is no good reason for the Court not to reach either or both of these issues. Whatever the basis of its decision, the Court will have to address substantial questions of constitutional law. Likewise, any decision, no matter its ground, will affect relations between the political branches. In particular, if the Court affirms the decision below on the *pro forma*-session ground, its ruling would confirm that either chamber of Congress can block the President from making recess appointments. That is no narrower, in

any meaningful sense, than a decision that upholds the reasoning of the court below.

Finally, contrary to the Board's assertion, a decision that adopts the reasoning of the court below would not significantly disrupt the operations of the federal government. While such a decision might call into question previous appointments, various doctrines of repose insulate settled government action from challenge on these particular grounds. Most potential claims would be barred by the six-year statute of limitations for claims challenging administrative action, and even actions unprotected by that bar could be cured through ratification. Finally, the *de facto* officer doctrine provides additional protection for certain actions. In sum, any impact is likely to be minimal.

STATEMENT

1. The National Labor Relations Board (the "Board") is governed by the National Labor Relations Act (the "Act"). The Act provides that the Board may not operate without a quorum of three validly appointed members. 29 U.S.C. § 153(b). *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644–45 (2010).

2. Craig Becker was a putative "recess appointment" to the Board. *Noel Canning v. NLRB*, 705 F.3d 490, 498 (D.C. Cir. 2013), Pet. App. 15a. This appointment was entered on March 27, 2010, during a seventeen-day intrasession "recess" of the Senate. 156 Cong. Rec. S2180 (daily ed. Mar. 26, 2010) (adjourning until April 12, 2010); 156 Cong. Rec. S2530

(daily ed. Apr. 21, 2010) ("Nominations Received: Senate received the following nominations: .... Craig Becker, of Illinois, to be a Member of the National Labor Relations Board for the term of five years expiring December 16, 2014 (Recess Appointment)."). *See also New Vista*, 719 F.3d at 218 (Becker was "was appointed during an intrasession break that began on March 26, 2010, and ended on April 12, 2010.").

3. Due to the Act's quorum requirement, hundreds of Board decisions depend on the lawfulness of Becker's appointment. During the twenty months that Becker served on the Board, it issued 386 published decisions, and an equal or greater number of unpublished ones, for which Becker was necessary to complete a three-member quorum. John Raudabaugh, Impact of Noel Canning on Obama NLRB Decisions: Void NLRB Decisions (Published and Unpublished), http://www.nrtw.org/en/nlrb-watch/what-noel-canning-decision-means.

4. On January 25, 2013, the United States Court of Appeals for the D.C. Circuit issued its decision in the instant case, holding that the Board lacked power to act because Board members essential to maintaining a quorum had not been validly appointed under the Recess Appointments Clause. Pet. App. 35a, 52a. That Clause was "inapplicable," the Court explained, for two alternative reasons: first, the Senate had not been in an intersession recess at the time of the putative appointments; second, the vacancies at issue had not arisen during the intersession recess of the Senate in which the appointments were made. *Id.* at

34a-35a, 51a-52a. Accordingly, "[t]he Board had no quorum, and its order is void." *Id.* at 52a.

Becker had left the Board by the time it issued the decision challenged in this case, and so the D.C. Circuit did not address the validity of his appointment in its decision. Pet App. 15a. After issuing the decision below, the D.C. Circuit *sua sponte* ordered that dozens of undecided petitions challenging putative final orders of the Board be held in abeyance, preventing their enforcement, pending further order. Among these are petitions challenging orders for which Becker was essential to satisfying the quorum requirement. *See, e.g.*, Order, *Alden Leeds, Inc. v. NLRB*, Nos. 11-1267, 11269 (D.C. Cir. Feb. 19, 2013) (challenging *In re Alden Leeds et al.*, 357 NLRB No. 20 (Dec. July 19, 2011)). The D.C. Circuit has subsequently recognized that, under the reasoning of the decision below, Becker's appointment was "constitutionally invalid." *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 952 (D.C. Cir. 2013).

5. The United States Court of Appeals for the Third Circuit confirmed the invalidity of Becker's appointment in *New Vista*, issued nearly four months after the decision below. The Third Circuit held that Becker's appointment did not comport with the original understanding of the Recess Appointments Clause and was therefore ineffective. That clause's reference to "the Recess of the Senate," the court found, "refers to only intersession breaks." 719 F.3d at 208. Accordingly, Becker, having been "appointed during an intrasession break," *id.* at 218, was "invalidly recess appointed to the Board," *id.* at 244. The Board therefore had fewer than three valid-

ly appointed members when it issued its orders, and therefore failed to satisfy the quorum requirement. *Id.* On that basis, the court vacated the orders. *Id.*

6. Actions similarly challenging Becker's "recess" appointment are currently pending before this Court and the Second, Third, Fourth, Fifth, Ninth, and D.C. Circuits. *See* Appendix ("Known Cases Implicating the Constitutional Validity of Craig Becker's Appointment to the Board").

7. In its petition for certiorari in the instant case, the Board disputed both of the alternative holdings of the decision below: that the President's recess-appointment power (1) may not be exercised during an intrasession recess of the Senate and (2) may not be exercised to fill vacancies that arose prior to a given recess. Pet. at I. The Respondent, in turn, proposed a third, "narrower," question, on which the Court has since requested briefing: "[w]hether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions." Brief of Respondent Noel Canning Regarding Certiorari at i.

ARGUMENT

I. A Decision Addressing Only the *Pro Forma*-Session Issue Would Not Resolve the Many Pending Legal Challenges to Becker's "Recess" Appointment

The live dispute over Craig Becker's "recess" appointment to the Board presents the very same issues as this case, with one important difference: at the time of Becker's appointment, during an in-

trasession recess, Congress was not convening in *pro forma* sessions. For that reason, a decision that holds President Obama's other "recess" appointments to the Board constitutionally invalid because Congress was convening in *pro forma* sessions around the time of those appointments would provide little or no guidance on the lawfulness of Becker's appointment. If the Court does not resolve the circuit splits on the scope of the President's recess appointment power in this case, it will have to do so in the next one, in light of the legal and practical confusion currently surrounding orders reliant on Becker's lawful appointment.

A. As the Board acknowledges, the scope of the President's recess-appointment power is the subject of two splits of authority among the circuits. *See* Pet. at 12. On one side of the first split are decisions by the D.C. Circuit (under review here), Third Circuit, and Fourth Circuit that have held, at a minimum, that this authority may be exercised only during an intersession recess of the Senate. *See* Pet. App. 34a; *New Vista*, 719 F.3d at 244; *NLRB v. Enter. Leasing Co. Se.*, LLC, 722 F.3d 609, 652 (4th Cir. 2013). On the other side is the Eleventh Circuit's decision in *Evans v. Stephens*, 387 F.3d 1220, 1224–26 (11th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 942 (2005), which held that the President may make recess appointments during either an inter- or intrasession recess of the Senate. These holdings are squarely in conflict.

The D.C. Circuit additionally held, in the decision below, that the President's recess-appointment power extends only to vacancies arising during the same recess in which the appointment is made. Pet. App. 51a-52a. That holding, in turn, is in conflict with decisions of the Second, Ninth, and Eleven Circuits. *United States v. Allocco*, 305 F.2d 704, 709–15 (2d Cir. 1962); *United States v. Woodley*, 751 F.2d 1008, 1012–13 (9th Cir. 1985) (en banc); *Evans*, 387 F.3d at 1226-27.

Affirming the decision below on the third ground proposed by the Respondent would leave these circuit splits unresolved. To begin with, the D.C. Circuit's two holdings would remain the law of the circuit, fully applicable in future cases brought there. *Cf. Balintulo v. Daimler AG*, 727 F.3d 174, 191 n.26 (2d Cir. 2013) (adhering to the reasoning of a decision that this Court affirmed on other grounds); *Broudy v. Mather*, 460 F.3d 106, 112 (D.C. Cir. 2006) (same). In addition, the position of the Third and Fourth Circuits on whether the President may make recess appointments during an intrasession recess would still be opposed to that of the Eleventh Circuit. Thus, a party challenging government action that relies on the lawfulness of a intrasession recess appointment would prevail in the D.C., Third, and Fourth Circuits, but fail in the Eleventh Circuit. Similarly, a party challenging government action that relies on the lawfulness of recess appointments to fill preexisting vacancies would prevail in the D.C. Circuit, but fail in the Second, Ninth, and Eleventh

Circuits. The Board is correct to suggest that this Court's guidance is necessary to resolve these splits in authority. *See* Pet. at 31.

B. More specifically, such a decision would not resolve the lawfulness of Becker's appointment to the Board, which is an issue in numerous ongoing proceedings. As described above, Becker was appointed during an intrasession recess when the Senate was not convening in *pro forma* sessions. A decision that addresses the scope of the recess-appointment power by affirming either of the alternative holdings of the decision below, or by reversing both of them, would be dispositive of the issue of Becker's appointment. By contrast, a decision that addresses only the legal import of *pro forma* sessions would say nothing concrete about whether Board actions that rely on Becker's "recess" appointment may stand.

That is no small matter. Becker's status has been challenged in dozens of cases, and several hundred more potentially could be filed. *See* Appendix (pending cases); Raudabaugh, *supra* (cases that potentially could be filed). At least one of those challenges—that of the *amicus curiae*—is already before this Court, and the Third Circuit has already held that Becker's appointment was constitutionally invalid. *New Vista*, 719 F.3d at 244. Moreover, if the D.C. Circuit adheres to its reasoning in *Noel Canning* following a decision on the *pro forma*-session issue by this Court, any party subject to Board action reliant on Becker's lawful appointment will be able to have

it vacated merely by filing a petition for review in that court. *See* 29 U.S.C. § 160(f) (allowing petitioners to seek review of NLRB final orders in either the local court of appeals or the D.C. Circuit, at the petitioner's choice).

Accordingly, if the Court's decision in this case does not resolve the lawfulness of Becker's appointment, it will almost certainly have to face that issue in a future case. In the meantime, both the Board and employers will face enormous and unnecessary uncertainty regarding the enforceability of orders reliant on Becker's appointment.

The Court can and should put the matter to rest in this case. A decision that affirms either of the D.C. Circuit's alternative holdings on the scope of the President's recess-appointment power would definitively resolve Becker's status. Those issues were considered by the court below, are fully briefed here, and are ripe for the Court's consideration. As such, there is no good reason for the Court to begin, and potentially end, its inquiry with the *pro forma*-sessions issue.

C. Uncertainty regarding Becker's status would be only one of several consequences if the Court were to decline to resolve the scope of the President's recess-appointment power. In addition, the President would face great uncertainty in considering whether to make recess appointments during intrasession recesses, even ones of substantial duration undivided by *pro forma* sessions. At the same time, the Congress would be in the dark about what it can do to

either facilitate or block the President's ability to make recess appointments. In the face of such uncertainty, compromise between the political branches is stymied, and the President's practical ability to make recess appointments is effectively curtailed—whether or not that is actually what the Constitution actually requires. This uncertainty may explain, at least in part, why no recess appointments have been made since the ones at issue here. *See* Pet. Br. Appx. at 64a, 89a.

But if the President were to "recess" appoint officials during intrasession recesses or to vacancies predating the recess, those officials would serve under a cloud, with uncertain legal status and authority. Their actions that are subject to challenge within the footprint of the Third and Fourth Circuit (and perhaps others) could be invalidated in every case, while those within the footprint of the Eleventh Circuit would be immune from such attacks. Presumably, the other circuits would soon have to choose sides in this dispute, dividing the nation into states where these recess appointees' actions on behalf of the federal government have the force of law, and states where they do not.

Again, the Court may avoid these consequences quite easily by settling the scope of the President's recess-appointment power.

II. The "Narrower" Ground Proposed by the Respondent Is No Narrower in Effect than the D.C. Circuit's Holdings

Contrary to the Respondent's contention, the *pro forma*-session issue is in no manner "narrower" than the bases of the decision below concerning the scope of the President's recess-appointment power. *See* Brief of Respondent Noel Canning Regarding Certiorari at 8. Either approach requires the Court to meet and decide weighty constitutional questions. Likewise, either approach will shape constitutional relations between the Executive and Legislative Branches going forward. While the Court should abide by its practice "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," *Liverpool, New York & Philadelphia S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885), that policy does nothing to distinguish between the different grounds of decision available in this case.[2]

A. Addressing the *pro forma*-session issue raised by the Respondent would require the Court to decide at least two substantial questions of constitutional law. To begin with is the question of who decides

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[2] To be clear, the *amicus curiae* supports the Respondent's argument that the January 4, 2012 appointments are invalid because they were made at a time when the Senate had not adjourned for more than three days, and argues only that, for prudential reasons, the Court should first consider the other questions presented before, if necessary, addressing that one.

when the Senate in recess, such that the recess-appointment power is inapplicable. In the Respondent's view, that decision is for the Senate itself, which may undertake *pro forma* sessions at any time to block the President from making recess appointments. *See* Resp. Br. at 49-66. Others have argued, however, that "the textual commitment of temporary appointment discretion to the Executive is absolute"—*i.e.*, the President gets to decide when the Senate is unavailable to receive and consent to nominations. Br. of Prof. Victor Williams, at 9. And the Board, in turn, contends that the courts get to decide, based on the facts and circumstances of each case, with some uncertain degree of deference due to the President. *See* Pet. Br. at 44-45, 51.

If the courts are to decide, that presents a second constitutional question: what standard are they to apply? According to the Board, "[t]he Senate is in recess when it cannot receive communications from the President or participate as a body in the appointment process." *Id.* at 45. This standard, however, is nowhere to be found in the constitutional text and, on its face, appears to conflict with the Adjournment Clause, which provides that "[n]either House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days . . . ." U.S. Const. Art. I, § 5, cl. 4. In other words, under the Board's proposed standard, the Senate could apparently be in recess even when the House has specifically refused to consent to the Senate's adjournment.

And elsewhere, the Board suggests an entirely different standard: whether the President reasonably believed that the Senate would conduct "no business." Pet Br. 51. This latter standard, the Board indicates, need not account for whether the Senate can or actually does conduct business during the period that the President has identified as its "recess." Pet. Br. 52-55. The key factor is apparently whether Senate business requires "unanimous consent." Pet. Br. 54-55. Of course, that is also how the Senate conducts most business when it is indisputably *in session*. *See* Senate Legislative Process, http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm (noting "the use of unanimous consent to conduct most of [the Senate's] business"). So choosing the proper standard is no small matter.

Neither is applying it to the circumstances here. Even accepting the Board's proffered standard—*i.e.*, that the *sine qua non* of the *Senate's* in-session status is whether it is appropriately responsive to the *President's* prerogatives—the application of those broad criteria to the Senate's *pro forma* sessions is not clear-cut. After all, the Senate did, in fact, pass legislation while it convened in *pro forma* sessions, *see* Pet. Br. at 48 n.47 (conceding as much), and the Board seems to argue that minor changes to Senate rules (regarding, for example, the routing of messages, scheduling practices, and the referral of litigation among committees) could be determinative of the question. Pet. Br. at 50-51. The weight, if any, that

the Court assigns to each of these kinds of factors would necessarily govern future activity within and between the political branches, encouraging them to jockey for advantage by altering their rules and conduct. That could have far-reaching, and unexpected, consequences.

The virtue of instead addressing the scope of the President's recess-appointment authority head-on is that it is comparatively straightforward. Either the President has authority to make appointments during intrasession recesses, or he does not. Either the President may fill vacancies predating the current recess, or he may not. Each of these issues, unlike the *pro forma*-session issue, calls for a bright-line rule that would be easy for the political branches to follow and for the courts to administer. There is no room for, and no likelihood of, political gamesmanship.

The point is that the Court does not get to duck difficult and important constitutional questions if it chooses to address the constitutional effect of the Senate's *pro forma* sessions as opposed to the scope of the President's recess-appointment power. Either way, the Court will have to formulate a rule of constitutional law, with some impact on the relations between the political branches.

B. It is certainly not apparent that this impact would be any less if the Court were to rest its decision on the *pro forma*-session issue. Although the Respondent is correct that "affirming the court of appeals on that basis would not call any appoint-

ments into question beyond those made on January 4, 2012," Brief of Respondent Noel Canning Regarding Certiorari at 35, what really matters is the impact going forward. Such a ruling would confirm that either chamber of Congress can block the President from making recess appointments. The Senate can do so directly, by declining to go into recess, while the House (as happened in this case) can exercise its authority under the Adjournment Clause to prevent the Senate from adjourning for long enough to support exercise of the recess-appointment power.

Accordingly, whenever the Presidency and at least one of the chambers of Congress are held by different political parties, the President's recess-appointment power could only be exercised at the sufferance of his opponents. That result would not be "narrower" in any meaningful sense than a decision that affirms either or both of the constitutional holdings of the decision below.

III. Contrary to the Board's Claims, a Decision Affirming the Logic of the Court Below Would Cause No "Disruption"

In its petition, the Board warned that the decision below "threatens a significant disruption of the federal government's operations," because it would open the floodgates to cases challenging long-ago government action dependent on now-invalidated recess appointments. Pet. at 30. But this point is misplaced: "It goes without saying that 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, stand-

ing alone, will not save it if it is contrary to the Constitution.'" *Stern v. Marshall*, 131 S. Ct. 2594, 2619 (2011) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

The Board's claim is also overblown, which may explain why the Board declined to repeat it, or anything like it, in its merits brief. While some number of the Board's recent decisions could be vulnerable to challenge under the reasoning of the decision below—hardly a novel phenomenon, given the Board's recent history, *see New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. 674 (2010) (holding the Board improperly constituted for failure to satisfy the Act's quorum requirement)—the broader effects are likely to be muted, due to ordinary doctrines of repose.

A. Most prominently, any challenge to government action under the Administrative Procedure Act is subject to the ordinary six-year catch-all statute of limitations for civil actions against the government of 28 U.S.C. § 2401(a). *See, e.g., Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 712-13 (9th Cir. 1991); *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1286 (5th Cir. 1997). The limitations period begins when the right of action "accrues," which occurs at the time of "final agency action." *Slater*, 120 F.3d at 631. So there is absolutely no risk that a decision which calls into question long-ago "recess" appointments would disrupt settled administrative action. Such claims would necessarily fail at the earliest stage of litiga-

tion. Nor may such claims be shoehorned into actions challenging an agency's application of longstanding regulations. *NLRB v. Fed. Labor Relations Auth.*, 834 F.2d 191, 196 (D.C. Cir. 1987) ("A petitioner's contention that a regulation suffers from some *procedural* infirmity . . . will not be heard outside of the statutory limitations period.").

B. Even government action that is still subject to challenge may be immunized—at least with respect to any recess appointment-related defects—by the ratification of properly appointed officials. Ratification "occurs when a principal sanctions the prior actions of its purported agent." *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998) (citing Restatement (Second) of Agency § 82 (1958)). Ratification has been employed in the past to cure administrative action tainted by legal defect, on the basis that it is nothing more than a routine exercise of an official's or agency's authority to act. *See, e.g., Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996) (taking "the FEC's post-reconstitution ratification of its prior decisions at face value and treat[ing] it as an adequate remedy" where the agency had initially been improperly constituted); *Doolin*,, 139 F.3d at 212-14 (ratification of order by properly appointed official approved where undertaken in "the normal course of agency adjudication"). Although ratification may not have retroactive effect, and may require the normal procedures for administrative action, *see Fed. Election Comm'n v. NRA Political Victory Fund*, 513 U.S.

88, 98-99 (1994), it provides a basis for a properly-appointed official or properly-constituted agency to address any lapse in authority due to questionable appointments.

C. Even where ratification is unavailable, some agency actions may be insulated from challenge by the *de facto* officer doctrine. That doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder v. United States*, 515 U.S. 177, 180 (1995). To be sure, "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." *Id.* at 182-83. *See also Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (challenge to official's authority "should be examinable at least on direct review, where its consideration encounters none of the objections associated with the principle of res judicata, that there be an end to litigation").

But that does not deprive the doctrine of all force. Thus, *Buckley v. Valeo*, 424 U.S. 1, 142 (1976), upheld the validity of certain actions by the FEC, despite its finding that the appointment of four members of the Commission by Congress, rather than the President, violated the Appointments Clause. In support, *Buckley* cited *Connor v. Williams*, 404 U.S. 549, 550-551 (1972), which similarly upheld "legisla-

tive acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment were not therefore void." *Ryder*, 515 U.S. at 183. While the application of the *de facto* officer doctrine is not without its uncertainties, at the least it provides an additional basis for repose where the legality of government action has already been tested and upheld and no further direct review is available.

CONCLUSION

The Court should affirm the decision below and should do so, as fairly possible, on the same grounds as that decision.

Respectfully submitted,

JAY P. KRUPIN
Counsel of Record
ANDREW M. GROSSMAN
LEE A. CASEY
BAKERHOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1700
jkrupin@bakerlaw.com

Counsel for the Amicus Curiae

NOVEMBER 2013

APPENDIX

APPENDIX

KNOWN CASES IMPLICATING THE CONSTITUTIONAL VALIDITY OF CRAIG BECKER'S APPOINTMENT TO THE BOARD

United States Supreme Court

Daycon Prods. Co. v. NLRB, No. 12-1445

D.C. Circuit

Alden Leeds, Inc. v. NLRB, Nos. 11-1267, 11-1296

Avista Corp. v. NLRB, Nos. 11-1397, 11-1432

Bruce Packing Co., Inc., v. NLRB, Nos. 12-1054, 12-1137

Caribbean Int'l News Corp. d/b/a El Vocero De Puerto Rico, Nos. 11-1487, 11-1490, 12-1079

Camelot Terrace, Inc. et al. v. NLRB, Nos. 12-1071, 12-1218

Chamber of Commerce et al. v. NLRB, No. 12-5250

Douglas Autotech Corp. v. NLRB, Nos. 12-1001, 12-1168, 12-1247

DHL Express, Inc. v. NLRB, Nos. 12-1072, 12-1143

DirectTV, Inc. v. NLRB, Nos. 11-1273, 11-1274, 11-1294

Dodge of Naperville, Inc. et al. v. NLRB, Nos. 12-1032, 12-1122

Europa Auto Imports, Inc., d/b/a Mercedes-Benz of San Diego v. NLRB, Nos. 11-1458, 11-1488

Hundai Am. Shipping Agency v. NLRB, Nos. 11-1351, 11-1413

KLB Indus., Inc. v. NLRB, No. 11-1280, 11-1322

Manhattan Ctr. Studios, Inc. et al. v. NLRB, Nos. 12-1017, 12-1104

NOVA Se. Univ. v. NLRB, Nos. 11-1297, 11-1331

NLRB v. Sw. Reg'l Council of Carpenters, Nos. 11-1212, 11-1445, 11-1446

Operative Plasterers' & Cement v. NLRB, No. 12-1291, 12-1056, 12-1024

Ozark Auto. Distribs., Inc., d/b/a O'Reilly Auto Parts, No. 11-1320, 11-1352

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Ozburn-Hessey Logistics, LLC, v. NLRB, Nos. 11-1481, 12-1064

Raymond Interior Sys., Inc. v. NLRB, Nos. 12-1024, 12-1056, 12-1291

Raymond Interior Sys., Inc. v. NLRB, Nos. 12-1011, 12-1012, 12-1013, 12-1047

Salem Hospital Corp., d/b/a/ Mem'l Hosp of Salem Cnty., Nos. 11-1466, 12-1009

S. New England Tel. Co., d/b/a AT&T Conn. v. NLRB, Nos. 11-1099, 11-1143

Spurlino Material of Indianapolis, LLC, v. NLRB, Nos. 12-1034, 12-1123

Teamsters Local Union No. 509 v. NLRB, Nos. 12-1002, 12-1103

Venetian Casino Resort, LLC, Nos. 12-1021, 12076

Wellington Indus., Inc., v. NLRB, Nos. 12-1018, 12-1120

Second Circuit

Kreisberg v. HealthBridge Mgmt., LLC, 732 F.3d 131 (2d Cir. 2013)

Third Circuit

New Vista Nursing v. NLRB, 719 F.3d 203 (3d. Cir. 2013)

Route 22 West Operating Co., No. 13-2151

Fourth Circuit

Nestle Dreyer Ice Cream Co. v. NLRB, No. 12-1684, 12-1783

Gestamp S. C., L.L.C. v. NLRB, -- F. App'x --, Nos. 2362, 12-1041, 2013 WL 5630054 (4th Cir. Oct. 16, 2013)

Fifth Circuit

Entergy Miss. Inc. v. NLRB, No 12-60644, 2013 WL 2907620 (5th Cir. June 5, 2013)

Ninth Circuit

Hooks v. Kitsap Tenant Support Servs., Inc., No. 3:13-cv-5470, 2013 WL 4094344 (W.D. Wash. filed June 6, 2013) (notice of appeal filed on Oct. 1, 2013)

AMICUS CURIAE BRIEF

No. 12-1281

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF SENATE PARLIAMENTARY EXPERTS ROBERT B. DOVE AND MARTIN B. GOLD AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

D. JOHN SAUER
Counsel of Record
SARAH E. PITLYK
MARY CATHERINE HODES
CLARK & SAUER, LLC
7733 Forsyth Boulevard
Suite 625
St. Louis, Missouri 63105
(314) 332-2980
jsauer@clarksauer.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are a former Parliamentarian of the United States Senate and a former parliamentary advisor to the Senate Majority Leader who is one of the nation's foremost experts on congressional procedure.

Amicus Robert B. Dove is one of only six persons to hold the office of Parliamentarian of the United States Senate since the creation of that office in 1937. Mr. Dove joined the Senate Parliamentarian's Office as Assistant Parliamentarian in 1966. He served the Senate as Parliamentarian from 1981 through 1987, and from 1995 through 2001. In his role as Parliamentarian, Mr. Dove served as the official procedural counselor to the Senate's presiding officer. He has also served as a parliamentary advisor to Senate Minority Leader Robert Dole and as a parliamentary consultant to a number of foreign legislatures, including the State Duma of Russia, the National Assembly of Bulgaria, the National Assembly of Kuwait, and the Parliament of Poland.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* represent that, in consultation with *amici*, they authored this brief in its entirety and that none of the parties or their counsel, nor any person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief. Counsel for all parties have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs.

Amicus Martin B. Gold served as Floor Advisor and Counsel to U.S. Senate Majority Leader Bill Frist, assisting him with floor procedure and strategy. He also served as counsel to former Senate Majority Leader Howard Baker and former Senator Mark O. Hatfield, whom he served as Minority Staff Director and Counsel to the Senate Committee on Rules and Administration. One of the nation's leading experts on congressional procedure, Mr. Gold has presented hundreds of seminars on Senate procedures and practices for congressional, governmental, academic, and private sector audiences. He has lectured on the parliamentary processes of the U.S. Congress at the Russian Federal Assembly, the Parliament of the Ukraine, and the Beijing Foreign Studies University, among many others. He is the author of an authoritative treatise, *Senate Procedure and Practice*, which has been through three editions since its publication in 2004, and which is cited three times by the Brief for the Petitioner in this case.

Together, Mr. Dove and Mr. Gold hold a wealth of collective expertise in Senate procedural rules. In addition, given their decades of service to the Senate, they have a personal interest in calling for the protection the Senate's institutional prerogatives, which are threatened by the Executive in this case.

SUMMARY OF THE ARGUMENT

When the United States Senate convenes in pro forma sessions, it is in session. It is not in recess. And, contrary to the Executive's argument in this case, during a pro forma session, the Senate is not both in session and in recess at the same time.

The arguments set forth in the Brief for the Petitioner ("Pet. Br.") and the 2012 Memorandum of the Office of Legal Counsel ("OLC Memo") (collectively, "the Executive"), fail to provide any convincing support for the Executive's claim that the U.S. Senate was in recess on January 4, 2012.

I. The Executive's discussions of the Senate's pro forma sessions reflect a fundamental misunderstanding of the Senate's history and traditions, and its role in our constitutional structure. First, the Executive misconstrues the deference that is due to the Senate in determining whether the Senate is in session under the Rules of Proceedings Clause. The Executive contends that the Legislative Branch is not entitled to any deference on the quintessentially legislative question of whether a house of the legislature is in session. Its argument disregards this Court's longstanding recognition that the Senate is entitled to substantial deference on such questions, even when they implicate the prerogatives of the President as well as the Senate.

Second, the Executive contends that the Senate's pro forma sessions constitute a parliamentary "device" or "stratagem" that wrongly elevates form

over substance. This argument betrays the Executive's tin ear to history. Over centuries, the Senate's traditions have incubated a variety of procedural devices that empower the minority to frustrate the will of the majority and of the Executive. Such devices promote consensus-building behind the scenes and permit the Senate to serve as the "cooling saucer" for executive initiatives.

Third, this case arises from a prolonged and recurring conflict between the Senate and the Presidency over competing prerogatives. This Court has called for "high walls and clear distinctions" in such cases. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). Such "high walls" are particularly appropriate here, because the politically diverse Senate is an unequal competitor with the unitary Executive in such prolonged conflict. The Executive has a consistent incentive to take an ever-broadening view of executive power. By contrast, at any given time, a significant subset of the Senate tends to side with the Presidency against the Senate's prerogatives. This dynamic threatens to gradually erode the prerogatives of the Senate, which exist not only for that institution's sake, but as structural checks to guarantee the liberty of all Americans.

II. The Senate's pro forma sessions constitute valid sessions of the Senate for every constitutional and parliamentary purpose. First, they constitute valid sessions of the Senate under the Presentment Clause; the Executive concedes that legislation may be passed under that Clause during pro forma sessions. Second, they constitute valid sessions of

the Senate under the Assembly Clause, as evidenced by decades of Congress's historical practice. Third, they constitute valid sessions of the Senate under the Adjournment Clause, in light of an even longer tradition. Fourth, they constitute valid sessions of the Senate under the Appointments Clause, because the Senate may just as easily confirm nominations by unanimous consent as it may pass legislation. Fifth, they constitute valid sessions of the Senate for other parliamentary purposes, such as permitting cloture votes to ripen, hearing presidential addresses, and entering formal messages into the Congressional Record.

The Executive contends that pro forma sessions are valid sessions of the Senate for purposes of the Presentment Clause and the Appointments Clause, but not for purposes of the Assembly Clause, the Adjournment Clause, or the Recess Appointments Clause. The Constitution contains no warrant for this contorted view that pro forma sessions are simultaneously part session and part recess.

III. Until the 2012 OLC Memo, every authority within the political branches to consider the question either presupposed or expressly understood that pro forma sessions constitute valid sessions of the Senate. The 1876 Senate floor debate cited by the Executive actually supports the view that pro forma sessions satisfy the Adjournment Clause. Even the Senators who were most scrupulously committed to compliance with the Adjournment Clause expressed no qualms about the use of pro forma sessions to satisfy that constitutional requirement. Likewise, pro forma sessions satisfy each of the four criteria

set forth in the 1905 Senate Judiciary Committee Report cited by the Executive. In more recent decades, Senators and Presidents of both political parties have understood that pro forma sessions are effective to prevent recess appointments. Finally, the current Administration advised this Court on the basis of that understanding as recently as 2010.

For all these reasons, as well as those stated in the Brief of Respondent, this Court should reject the Executive's position regarding pro forma sessions and affirm the judgment of the court below.

ARGUMENT

I. The Executive's Discussion of the Senate's Pro Forma Sessions Misapprehends Basic Principles of the Senate's History and Constitutional Role.

The Executive's argument regarding the Senate's pro forma sessions misapprehends basic principles of the Senate's history and procedure and its role in our constitutional framework.

A. The Senate's Determination of Whether the Senate Is in Session Is Entitled to Substantial Deference.

First, the Executive misconstrues the deference that is due to the Senate in regulating its own proceedings. In both the OLC Memo and its Opening Brief, the Executive contends that, while the Senate may be entitled to "some leeway" on "internal matters," Pet. Br. 60, such deference "has no proper bearing" when "the President . . . has a direct interest" in determining whether the Senate is in session, *id.* at 62. *See also Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. ___ (Jan. 6, 2012), *available at* www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf (all Internet materials last visited Nov. 23, 2013) ("OLC Memo"), at 20-21.

The Executive cites no judicial authority for its no-deference theory, and it has no support in this Court's jurisprudence. Rather, this Court's cases

establish that (1) on internal legislative matters, disputes about Congress's rules and procedures constitute non-justiciable political questions, while (2) on matters implicating the rights of third parties, including the President's prerogatives, the questions are justiciable but the Legislative Branch is still entitled to very substantial deference. In *United States v. Ballin*, this Court expounded this rule as follows:

> The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just.... The power to make rules ... is a continuous power, always subject to be exercised by the house, and within the limitations suggested, *absolute and beyond the challenge of any other body or tribunal.*

144 U.S. 1, 5 (1892) (emphasis added); *see also id.* ("Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration.").

This Court has consistently adhered to this interpretation. For example, in *United States v. Smith*, 286 U.S. 6 (1932), considering the validity of

a presidential appointment to the Federal Power Commission, this Court emphasized that "[i]n deciding the issue, the Court must give great weight to the Senate's present construction of its own rules." *Id.* at 33 (quoting *Ballin*, 144 U.S. at 5); *see also Christoffel v. United States*, 338 U.S. 84, 88 (1949) ("Congressional practice in the transaction of ordinary legislative business is of course none of our concern...."). Addressing a dispute between the President and the Senate over an appointment, this Court in *Smith* required "compelling" reasons to overrule the Senate's interpretation of its own rules. 286 U.S. at 48. The Court stated:

> To place upon the standing rules of the Senate a construction different from that adopted by the Senate itself when the present case was under debate is a serious and delicate exercise of judicial power. The Constitution commits to the Senate the power to make its own rules; and it is not the function of the Court to say that another rule would be better.

Id. Notably absent from *Smith* is any statement that the President, rather than the Senate, is entitled to deference in such cases.

Without invoking this Court's cases, the Executive contends that the President's determination whether the Senate is in session is entitled to something like *Chevron* deference. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Executive argues that "the President is necessarily vested with a large, although not unlimited, discretion to

determine when there is a real and genuine recess," and that "[e]very presumption is to be indulged in favor of the validity of whatever action [the President] may take." OLC Memo, at 5 (quoting *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 25 (1921) ("Daugherty Opinion")) (brackets added by OLC Memo). The assertion of deference to the President's determination whether the Senate is in session is a constant refrain of the Executive's analysis. *See* OLC Memo, at 1, 5, 9, 13, 14, 15, 17, 21, 23.

The notion that the President, rather than the Senate, should command deference in this context is an innovation unique to the Executive. The only support cited by the Executive for this counterintuitive proposition consists of a series of prior Executive opinions interpreting the scope of the Executive's own power. *See id.* at 5. The ultimate source of this theory is a dictum in the 1921 opinion of Attorney General Daugherty, added as an afterthought, which cites nothing at all on this point. *See* OLC Memo, at 14 (quoting Daugherty Opinion, 33 Op. Att'y Gen. at 25). For the reasons stated above, this principle is inconsistent both with this Court's cases and with the Rules of Proceedings Clause. U.S. Const. art. I, § 5, cl. 2. Though the Recess Appointments Clause implicates the prerogatives of both the Senate and the President, the question whether the Senate is in session is one of uniquely legislative competence, which the Constitution vests (quite naturally) in the Legislature. *See Smith*, 286 U.S. at 48.

B. The Use of Parliamentary "Stratagems" and "Devices" To Magnify the Power of the Minority Is a Fundamental Attribute of the Senate.

Second, the Executive repeatedly complains that the use of pro forma sessions to prevent a recess of the Senate rewards parliamentary maneuvering and elevates form over substance. For example, the Executive's brief contends that pro forma sessions constitute a parliamentary "stratagem," Pet. Br. 9, 10, 12, 50; that they "were being held merely as a matter of form," *id.* at 10; that they are a "legal fiction," *id.* at 11, 62; that they constitute "shirking," *id.* at 45; that they were "a stratagem to paper over what was in substance a continuous Senate recess," *id.* at 50; that they are a procedural "device," *id.* at 55; and that they constitute a "gambit," *id.* at 56.

Such arguments turn a blind eye to the actual history and practice of the Senate. The use of parliamentary maneuvering in the Senate, and the elevation of parliamentary form over substance, are not constitutionally suspect novelties. Rather, they are fundamental attributes of Senate procedure and practice, established over centuries of parliamentary tradition. In fact, the use of such maneuvers to magnify the power of minority voices, and encourage consensus-building behind the scenes, is perhaps the most distinctive historical attribute of the Senate:

> Unlike the House, the Senate is not a majoritarian institution. ... In the Senate, the minority has a distinct voice, and the majority often struggles to govern at all....

> The Senate is a place where political minorities and individual members hold great power, resting on authority drawn from Senate rules and more than two hundred years of related precedents and traditions.

Martin B. Gold, *Senate Procedure and Practice* xii (2d ed. 2008); *see also* Richard A. Arenberg & Robert B. Dove, *Defending the Filibuster: The Soul of the Senate* 10-18 (2012). "[I]n the end, it is the privilege of debate and amendment that protects the minority, encourages consensus, and establishes the Senate as the stabilizing force in our national politics." Arenberg & Dove, *supra*, at 177. One example (among many) of this principle is the tradition of an individual senator imposing a "hold" on legislation, which is cited by the Executive in this case. *See* Pet. Br. 54 n.53. "A senator's power to impose and enforce a hold is grounded in his right to debate and his unilateral ability to object to unanimous consent requests." Gold, *supra*, at 84. The power to impose holds greatly amplifies the power of a single senator, often to the frustration of majority blocs and the Executive.

This case involves the use of a parliamentary procedure (the pro forma session) by a determined minority of Senators to frustrate the objectives of a majority of Senators and the Executive. Exactly the same dynamic is at work in other well-known Senate practices that routinely permit Senate minorities to thwart the aims of the majority and the Executive. *See* Arenberg & Dove, *supra*, at 18 (explaining the function of various Senate parliamentary tactics as

"protecting minority rights" and "encourag[ing] a search for consensus in the Senate"). Such devices implement the Framers' vision that the Senate should operate by supermajority or consensus and thus serve as a powerful check on the Executive, as reflected in the oft-repeated but "probably apocryphal story of George Washington explaining to Thomas Jefferson ... that the Senate was included in the federal design to serve the same function as the saucer into which he poured his hot tea to cool." *Id.* at 2-3.

C. This Court Should Closely Scrutinize This Assertion of Executive Power Because the Senate and the Unitary Executive Are Unequal Competitors In Interbranch Rivalry Over Prerogatives.

In *Plaut v. Spendthrift Farm, Inc.*, this Court stated:

> [T]he doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features ... it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.

514 U.S. 211, 239 (1995). This observation applies with special force in this case. "[I]n the heat of interbranch conflict," *id.*, the unitary nature of the Presidency gives it a structural advantage over the

politically diverse Senate. Regardless of which party holds the Presidency, the Executive has a consistent incentive to take a broad view of executive power. By contrast, at any given time, either the majority or a significant minority of the Senate typically sides with the President, as partisan loyalty tends to trump institutional loyalty in these cases. Thus, over decades and centuries, the Executive speaks with a unified voice in favor of executive power, while the Senate seldom, if ever, speaks with a unified voice in defense of threatened Senate prerogatives.

This case vividly illustrates this structural dynamic. The OLC Memo that sparked this controversy has two notable features: (1) its extensive reliance on authorities from within the Executive to support its key contentions; and (2) its reflection of the Executive's steadily broadening view of its own power. For example, the dictum in the 1921 opinion of Attorney General Daugherty, on which the Executive principally relies for its erroneous theory of deference to the President, was actually intended to disavow the claim that an adjournment of five or ten days could constitute a "recess":

> And looking at the matter from a practical standpoint, no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of the duration just mentioned [*i.e.*, less than three days] is taken. Nor do I think an adjournment for 5 or even 10 days can be said to constitute the recess intended by the Constitution.

Daugherty Opinion, 33 Op. Att'y Gen. at 25 (concluding that a 28-day intrasession adjournment constituted a "recess"). Nine decades later, the Executive has made at least one recess appointment during a ten-day adjournment, while recess appointments during 11-day, 12-day, and 13-day adjournments have become commonplace. *See* OLC Memo, at 7 n.9. Moreover, in contrast to the Daugherty Opinion, the recent OLC Memo declines to concede even that the three-day adjournment authorized by the Adjournment Clause is not a "recess." *See id.* at 9 n.13; *but see* Pet. Br. 18.

By contrast, there is no comparable tradition in the politically diverse Senate of taking a consistently broadening view of the Senate's authority against the President. On the contrary, at any given time, a significant subset of the Senate—those Senators of the President's political party—typically aligns with the President on such questions.

Over time, the Executive's structural advantage in an interbranch rivalry of this nature leads to a gradual encroachment upon the prerogatives of the Senate. Moreover, the structural safeguards of the separation of powers do not exist solely, or even principally, for the sake of the Senate as an institution. Rather, as this Court has frequently observed, "the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989). Indeed, "[t]he Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that

allocated powers among three independent branches. This design serves not only to make government accountable but also to secure individual liberty." *Boumediene v. Bush*, 553 U.S. 723, 742 (2008). This Court, therefore, should scrutinize the Executive's assertion of power in this context with particular care, giving due consideration to the Senate's unique role in our constitutional structure as a check upon the power of the President.

II. Pro Forma Sessions Constitute Valid Sessions of the Senate For Every Constitutional and Parliamentary Purpose.

On the Executive's view, when the Senate meets in pro forma session, the Senate is in session for purposes of the Presentment Clause and the Appointments Clause, but in recess for purposes of the Recess Appointments Clause, the Assembly Clause, and the Adjournment Clause. The common thread of the Executive's position is that the Senate is in session when its being in session will result in an increase in the authority of the Executive; otherwise, it is in recess. Contrary to the Executive's argument, this is not the "better view." Pet. Br. 59. The "better view," *id.*, is that the Senate is simply and unqualifiedly in session when it meets in pro forma sessions.

A. The Executive Concedes That, During Pro Forma Sessions, Legislation May Be "Passed" Within the Meaning of the Presentment Clause.

First, the Executive does not dispute that a bill may be "passed" by the Senate during a pro forma session under the Presentment Clause. U.S. Const. art. I, § 7, cl. 2. That clause provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated....

Id. On December 23, 2011, during a pro forma session, the Senate passed H.R. 3765, the Temporary Payroll Tax Cut Continuation Act of 2011. 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). This bill was passed by unanimous consent, notwithstanding the Senate's previous order of December 17, 2011, stating that there would be "no business conducted" during this pro forma session. 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). On August 5, 2011, during a pro forma session, the Senate passed the Airport and Airway Extension Act of 2011. 157 Cong. Rec. S5297 (daily ed. Aug. 5, 2011). The President "approve[d]" both bills and signed them into law. U.S. Const. art. I, § 7, cl. 2; *see also* Resp. Br. 53-54. Moreover, the OLC Memo acknowledges that "[t]wice in 2011, the Senate passed legislation during pro forma sessions by unanimous consent, evidenced

by the lack of objection from any member who might have been present at the time." OLC Memo, at 21.

In this case, the Executive does not contend that the Temporary Payroll Tax Cut Continuation Act of 2011 and the Airport and Airway Extension Act of 2011, both of which the President signed into law, are constitutionally invalid. The Executive's concession that these pieces of legislation were validly "passed" under the Presentment Clause is deeply damaging to its litigation position. It is difficult to see how a pro forma session may be dismissed as a mere "legal fiction," Pet. Br. 11, 62, when the Senate exercised one of its most consequential functions—passing legislation—during such a session.

B. Pro Forma Sessions Constitute Valid Sessions of the Senate For Purposes of the Assembly Clause.

Section Two of the Twentieth Amendment requires that "Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. Const. amend. XX, § 2. The Senate has satisfied its constitutional obligation to assemble at noon on the third of January with a pro forma session at least six times over more than three decades. Christopher M. Davis, Cong. Research Serv., *Memorandum re: Certain Questions Related to Pro Forma Sessions of the Senate*, 158 Cong. Rec. S5954, 5955 (daily ed. Aug. 2, 2012); *see also* Resp. C.A. Br. 43-44. The House of Representatives has likewise fulfilled its obligation

under the Assembly Clause with pro forma sessions. *See, e.g.*, 158 Cong. Rec. H1 (daily ed. Jan. 3, 2012) ("This being the day fixed pursuant to the 20th Amendment to the Constitution for the meeting of the second session of the 112th Congress, the House met at noon and was called to order by the Speaker pro tempore.... Pursuant to section 4(a) of House Resolution 493, no organizational or legislative business will be conducted on this day."); Pub. L. No. 111-121, 123 Stat. 3479 (2009) (providing that the next congressional session would begin at noon on January 5, 2010); 156 Cong. Rec. H2 (daily ed. Jan. 5, 2010) ("[N]o organizational or legislative business will be conducted on this day."); H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (1979) ("[W]hen the Congress convenes on January 3, 1980, ... neither the House nor the Senate shall conduct organizational or legislative business until Tuesday, January 22, 1980, [unless convened sooner by House or Senate leadership]."). *See also* Resp. C.A. Br. 43-44 & n.24.

Prior to this case, the validity of this practice had never been questioned by the Executive or any other agency. Even the OLC Memo concedes that pro forma sessions satisfy the Assembly Clause. OLC Memo, at 18 & n.22 (conceding that "in other contexts ... a pro forma session may have the same legal effect as any other session and thus may fulfill certain constitutional requirements," including those of the Assembly Clause and the Adjournment Clause). During this litigation, however, the Executive has shifted its position to contend that the practice of satisfying the Assembly Clause through pro forma sessions is constitutionally suspect. *See*

Pet. Br. 61 n.60. This argument has no merit. First, it is inconsistent with the Executive's position in this very case, because the Executive repeatedly contends that the putative "recess" at issue consisted of "the 20-day period" between *January 3* and January 23, 2013, thus presuming that the Senate validly assembled on January 3, 2013. *See, e.g.*, Pet. Br. 45, 50, 51, 60. Second, it runs afoul of the Executive's own standards for historical legitimization, set forth in Section I of its Opening Brief: "[A] practice of at least twenty years duration ... is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning." Pet. Br. 27-28 (quoting *The Pocket Veto Case*, 279 U.S. 655, 690 (1929)). Third, it cannot be squared with the deference due to the Senate's determination of whether and when it is in session under the Rules of Proceedings Clause. *See supra* Part I.A.

The Executive also suggests that the Senate does not "assemble" within the meaning of the Twentieth Amendment through a pro forma session attended by only one Member. Pet. Br. 61 n.60. This contention is meritless in light of longstanding Senate procedural traditions. "In daily practice, the Senate operates on the principle of a presumptive quorum, which means that the presence of a quorum is assumed unless its absence is suggested." Gold, *supra*, at 37. Thus, a quorum of the Senate is presumed to be present at a pro forma session, unless an attending senator raises a point of no quorum. As noted above, this presumptive-quorum rule is just the sort of internal legislative procedural

rule that is "absolute and beyond the challenge of any other body or tribunal." *Ballin*, 144 U.S. at 5.

C. Pro Forma Sessions Constitute Valid Sessions of the Senate Under the Adjournment Clause.

Article I, section 5, clause 4 of the Constitution provides that "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days...." U.S. Const. art. 1, § 5, cl. 4. It is undisputed that both Houses of Congress have used pro forma sessions to satisfy their obligations under the Adjournment Clause for the better part of a century, without objection from the Executive. *See* OLC Memo, at 19 n.25 (detailing 13 documented examples of the use of pro forma sessions to satisfy the Adjournment Clause, occurring in 1929, 1950, 1980, and 1981); Resp. C.A. Br. 42 n.23 (citing 21 examples in the Congressional Record of the Senate's use of pro forma sessions to satisfy the Adjournment Clause, dating to 1949); *see also* Gold, *supra*, at 30 ("In the absence of an adjournment resolution, the Senate and/or House may meet in pro forma sessions in order to have convened frequently enough to meet constitutional requirements."). In fact, the Senate first used pro forma sessions to satisfy the Adjournment Clause in 1854. Resp. Br. 51.

The OLC Memo does not question the validity of using pro forma sessions to satisfy the Adjournment Clause. OLC Memo, at 18. Yet, here again, the Executive has shifted its position in this litigation and belatedly questions the use of pro forma sessions

to satisfy the Adjournment Clause, contending that "the better view is that pro-forma sessions do not comply with the Adjournment Clause." Pet. Br. 59-60. This argument suffers from the same defects as afflict the Executive's objection to the Senate's use of pro forma sessions to satisfy the Assembly Clause. *See supra* Part II.B. Because both Houses of Congress have used pro forma sessions to satisfy the Adjournment Clause numerous times dating back to 1854, the Executive's position contradicts its own contention that "a practice of at least twenty years duration ... is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning." Pet. Br. 27-28 (quoting *The Pocket Veto Case*, 279 U.S. at 690). Moreover, once again, Congress is owed substantial deference in its determination of whether and when it is session under the Rules of Proceedings Clause. *See supra* Part I.A.

The Executive argues in the alternative that the legitimacy of Congress's use of pro forma sessions to satisfy the Assembly and Adjournment Clauses does not translate to the Recess Appointments Clause, because the former clauses serve mere "housekeeping purposes," "affect the operations of only the House in question," or in any case "affect the Legislative Branch *alone*." OLC Memo, at 19 (emphasis in original); *see also* Pet. Br. 60 (arguing that the Adjournment Clause is "principally related to internal matters"); *id.* at 61-62 (characterizing the House and Senate's Adjournment Clause obligations as "obligations to one another" in which "the President has no direct interest"). This argument

rests on the erroneous premise that the Legislative Branch is not entitled to deference on matters of peculiarly legislative competence that implicate the prerogatives of the Executive; this premise has no merit for the reasons discussed above. *See supra* Part I.A. Moreover, the constitutional requirements that the Houses of Congress meet regularly and in conjunction with one another are not mere "housekeeping" requirements; they ensure that the federal legislature is available and able to conduct the affairs of the nation.

D. Pro Forma Sessions Constitute Valid Sessions of the Senate Under the Appointments Clause.

Furthermore, the Executive concedes that pro forma sessions constitute valid sessions of the Senate under the Appointments Clause. Article II, section 2, clause 2 of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States...." U.S. Const. art II, § 2, cl. 2. It is beyond dispute that the most common method for the Senate to exercise its authority of "Advice and Consent" is by unanimous consent. *See, e.g.*, S. Doc. No. 28, 101st Cong., 2d Sess., *Riddick's Senate Procedure: Precedents and Practices* 942 (1992) ("By unanimous consent the Senate could go into executive session for the consideration of a specific nomination regardless of its location on the Calendar."). And the Executive does not dispute that the Senate may pass legislation by unanimous

consent at pro forma sessions. By parity of reasoning, it is indisputable that the Senate may confirm presidential appointments by unanimous consent during pro forma sessions. Indeed, the OLC Memo expressly acknowledges this possibility; after noting that the Senate has validly passed legislation and engaged in other actions at pro forma sessions, the OLC Memo concedes that "[c]onceivably, the Senate might provide advice and consent on pending nominations during a pro forma session in the same manner." OLC Memo, at 21; *see also* 158 Cong. Rec. S113 (daily ed. Jan. 26, 2012) (Sen. Lee) ("During the Senate's pro forma sessions, including its session on January 6, 2012, the Senate was manifestly capable of exercising its constitutional function of advice and consent.").

This concession is perhaps the most damaging of all to the Executive's position in this case. The Appointments Clause immediately precedes the Recess Appointments Clause in Article II. The Executive recognizes that two are so conceptually interrelated that they should be viewed as a single provision governing presidential appointments. *See* OLC Memo, at 9-10. In essence, the Executive claims that, when the Senate meets pro forma, it is *available* to provide advice and consent on presidential appointments under the Appointments Clause at the very same time that it is *unavailable* to provide advice and consent on presidential appointments under the Recess Appointments Clause. This simply will not do.

In attempt to explain this contradiction, the Executive contends that the Senate's December 17,

2011, order stating that there would be "no business conducted" at the pro forma sessions rendered the Senate "unavailable" to provide advice and consent on presidential nominations. *See* Pet. Br. 48 (quoting Pet. App. 91a); *see also* OLC Memo, at 21-22. This explanation has no merit. The Executive contends that "the December 17 order *barred* the Senate as a body from conducting any business—including providing advice and consent on Presidential nominations—for the entire 20-day period between the start of the Second Session of the 112th Congress at noon on January 3 and the Senate's next regular session on January 23." Pet. Br. 48 (emphasis added). But, on the very same page, the Executive concedes that "the Senate did pass legislation ... on a day when it had been scheduled to hold a pro-forma session" pursuant to the very same December 17 order stating that "no business" would be "conducted." *Id.* at 48 n.47. Thus, it is perfectly plain that the Senate was not "barred" from considering presidential nominations during the pro forma sessions by the December 17 order, any more than it was "barred" from passing legislation during the pro forma sessions, as it went on to do. The Senate was in session and available to consider the President's nominations; it simply failed to act on them. While this inaction may be a source of great frustration to the Executive, such frustration is both commonplace and inherent in the constitutional role of the Senate as a check on executive power.

E. Pro Forma Sessions Constitute Valid Sessions of the Senate For Other Parliamentary Purposes.

Pro forma sessions also constitute valid sessions of the Senate for many other parliamentary purposes. Among other things, the Senate has used pro forma sessions to enable Senate committees to meet, *see, e.g.*, 154 Cong. Rec. S8907 (daily ed. Sept. 17, 2008); to permit a cloture vote to ripen, *see, e.g.*, 133 Cong. Rec. 15,445 (1987); to hear a presidential address, *see, e.g.*, 139 Cong. Rec. 3039 (1993); to enter formal messages into the Congressional Record, *see, e.g.*, 157 Cong. Rec. S8789-90 (daily ed. Dec. 23, 2011); to revise its schedule by unanimous consent, *see, e.g.*, 127 Cong. Rec. 263 (1981); and to authorize its "Presiding Officer . . . to sign bills and joint resolutions passed by the two Houses and found truly enrolled," 109 Cong. Rec. 22,941 (1963). Such activities belie the Executive's attempt to characterize pro forma sessions as empty formalities.

This history also demonstrates that pro forma sessions satisfy even the Executive's chosen standard for a legitimate Senate session. For example, one part of the Executive's argument is that, "for Recess-Appointments-Clause purposes, a 'recess' exists during 'the period of time . . . when, because of its absence, [the Senate] cannot receive communications from the President...." Pet. Br. 45 (quoting S. Rep. No. 58-4389, at 2 (1905) ("1905 Senate Report")). By this standard, the Executive argues, the Senate must have been in "recess" between January 3 and January 23, 2012, because two messages from the President and the House that

"arrived" during that period were not "formally laid before the Senate" until January 23rd. Pet. Br. 49; *see also* OLC Memo, at 14. But it is undisputed that the Senate has entered formal messages into the Congressional Record at a pro forma session. *See* OLC Memo, at 21 (citing 157 Cong. Rec. S8789-90 (daily ed. Dec. 23, 2011)). The Senate could have done likewise with the messages received between January 3 and January 23, 2012. Thus, the Executive cannot claim that it was in recess on those grounds. *See also infra* Part III.B.

In sum, on the Executive's view, a pro forma session is neither fish nor fowl—or if it is fowl, it is an odd duck indeed. It is sufficiently robust to allow the Senate to fulfill even the most consequential of functions—such as passing legislation—but, at the same time, it is sufficiently flimsy and fictitious as to render the Senate unavailable to consider executive nominations by unanimous consent. This contorted view is not "the better view." Pet. Br. 59. The better view is that the Senate is simply in session during a pro forma session.

III. Every Political Authority To Consider the Question Prior To January 2012 Understood That Pro Forma Sessions Are Valid Sessions of the Senate.

Notably, the OLC Memo was the first authority within the political branches to opine that pro forma sessions do not constitute valid sessions of the Senate for purposes of the Recess Appointments Clause. *See* OLC Memo, at 4 ("The question is a novel one...."). In fact, every authority within the

political branches to consider the question prior to January 2012 either presupposed or expressly understood that periodic pro forma sessions prevent a "recess" of the Senate within the meaning of the Recess Appointments Clause.

A. The 1876 Floor Debate Presupposed the Validity of Pro Forma Sessions.

The Executive contends that, in an 1876 floor debate, "the Senate appears to have concluded" that pro forma sessions were not valid sessions of the Senate for purposes of the Adjournment Clause. Pet. Br. 60-61 (citing 5 Cong. Rec. 333 (1876)). In fact, the 1876 Senate floor debate demonstrates the exact opposite: Even the Senators who were most scrupulously committed to compliance with the Adjournment Clause expressed no qualms about the use of pro forma sessions to satisfy that constitutional requirement.

The 1876 Senate floor debate considered how to effect a nine-day holiday break without running afoul of the Adjournment Clause. The House of Representatives had just adopted a "formal resolution" stating it would "adjourn over for the constitutional period [i.e., three days], to meet each day of adjournment and adjourn again, and so on until Wednesday, the 3d of January." 5 Cong. Rec. 333 (1876) (Sen. Anthony). The Senate was considering a parallel resolution, but certain Senators objected that adopting such a resolution would be tantamount to planning a nine-day recess without House approval, in violation of the Adjournment Clause. *Id.* at 334 (Sen. Bayard); *id.* at

334-35 (Sen. Conkling). In response to these objections, another Senator proposed that the Senate proceed with a resolution providing for only the initial three-day adjournment, with a "general understanding" that it would take two subsequent three-day adjournments, "[w]ithout the transaction of any business in the mean time." *Id.* at 333 (Sen. Anthony). That proposal carried the day. *Id.* at 338.

The transcript of the 1876 debate undermines several of the Executive's claims in this case. Most notably, at the debate's conclusion, the Senate decided (in the form of a "general understanding") to meet in three pro forma sessions interrupted by three-day recesses over the course of nine days, apparently satisfied that doing so would not run afoul of the Adjournment Clause. *Id.* That hardly qualifies as having "concluded" that pro forma sessions do not satisfy the Adjournment Clause. Moreover, in the course of the debate, it was suggested (1) that taking serial three-day adjournments would not be a novel course of action, *see id.* at 334 (Sen. Anthony) ("Therefore I suggested that there be an informal understanding that tomorrow we shall adjourn for three days, and then for three days, and then for three days again, *which has been frequently done here*, and it is done now by the House.") (emphasis added); and (2) that one advantage of holding pro forma sessions was that the Senate would remain available to conduct business as necessary. *Id.* (Sen. Anthony) (noting that the proposal "leaves it in the power of the Senate, if any exigency should occur, to take any action that might be deemed necessary").

Furthermore, even the two Senators who objected to the originally proposed resolution did not object that holding only pro forma sessions over a nine-day period would violate the Adjournment Clause. Rather, their objections were purely procedural: that formalizing a plan for three successive adjournments in advance might violate the Adjournment Clause, and that it would not be possible for the Senate to vote on subsequent adjournments in the absence of a quorum, and so the Senate might have to adjourn from day-to-day, rather than for three-day periods. *See id.* at 334 (Sen. Conkling and Sen. Bayard). Neither of these objections comes close to an argument that pro forma sessions fail to satisfy the Adjournment Clause.

B. Pro Forma Sessions Satisfy the Criteria Set Forth in the 1905 Senate Judiciary Committee Report.

The Senate Judiciary Committee Report of 1905, upon which the Executive heavily relies, likewise supports the validity of pro forma sessions. *See* S. Rep. No. 58-4389 (1905) ("1905 Senate Report"). In 1903, President Theodore Roosevelt had attempted to make recess appointments between two sessions of Congress with no temporal break at all between them—*i.e.*, one session had ended at the very moment that the next began. In response, the Senate Judiciary Committee wrote an opinion stressing that "a recess of the Senate" had to be "something real, not something imaginary; something actual, not something fictitious." *Id.* at 1-2. The Committee stated that a "recess" is

> the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions;* when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments.

Id. at 2 (emphasis in original). The Executive interprets the 1905 Senate Report as supporting a "functional standard" for a recess, permitting the President to determine that the Senate is effectively in "recess" for the purpose of the Recess Appointments Clause, even when it is meeting regularly in pro forma sessions. *See* Pet. Br. 45-49; OLC Memo, at 12-14. But the Senate report argued quite the opposite. It argued that the President could not simply deem the Senate to be in recess whenever it suited his purposes; the Senate had to be genuinely unavailable in order for the Recess Appointments Clause to be triggered:

> The framers of the Constitution were providing against a real danger to the public interest, not an imaginary one. They had in mind a *period of time* during which it would be *harmful* if an office were not filled; not a constructive, inferred, or imputed recess, as opposed to an actual one.

1905 Senate Report, at 3 (emphases in original).

Moreover, pro forma sessions satisfy each of the criteria enumerated in the 1905 Senate Report. First, pro forma sessions consist of "sitting in regular ... session as a branch of Congress," *id.* at 2. The Executive's contention to the contrary is entirely question-begging. In fact, pro forma sessions routinely occur while the Senate is sitting in regular session. *See* Pet. Br. 48 (noting that noon on January 3, 2012, marked the beginning of the Second Session of the 112th Congress). Second, all members of the Senate have the same duty of attendance at pro forma sessions as at any other session of the Senate. *See* Resp. Br. 61-63.

Third, during pro forma sessions, the Senate's "Chamber" is not "empty." 1905 Senate Report, at 2. Rather, certain Senators are in attendance at each session; even the Executive does not contend that the chamber is "empty." *See* Pet. Br. 48 (noting that, "on January 6, 2012, a virtually empty chamber was gaveled into pro-forma session by Senator Webb"); *see also* Resp. Br. 58-60 (noting the difficulty of ascertaining how many Senators were in fact in attendance at any pro forma session). Moreover, the number of members physically in attendance is not, by itself, a good indicator of the Senate's level of activity. *See* Elizabeth Rybicki, Cong. Research Serv., 96-452, *Voting and Quorum Procedures in the Senate* 1 (2013) ("As any observer of the Senate soon notices, typically only a handful of Senators are present during floor debates. It is unusual for as many as 51 Senators to be present on the floor at the same time...."). And even with very few Senators in attendance, the Senate can conduct vital business, including passing legislation and approving

presidential nominations. *See supra* Part II; OLC Memo, at 13 n.17, 21; Resp. Br. 58-60; *see also* Elizabeth Rybicki, Cong. Research Serv., RL 31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure* 9 (2013) ("Most nominations are brought up by unanimous consent and approved without objection....").

Finally, the Senate is fully capable of both receiving communications from the President and "participat[ing] as a body in making appointments" during pro forma sessions. 1905 Senate Report, at 2. There is no doubt that the Senate can enter formal messages into the Congressional Record at a pro forma session. *See* OLC Memo, at 21 (citing 157 Cong. Rec. S8789-90 (daily ed. Dec. 23, 2011)). The Senate can also convene committee meetings for consideration of presidential nominees during pro forma sessions. *See* 154 Cong. Rec. S8907 (daily ed. Sept. 17, 2008) ("We will be in pro forma session so committees can still meet...."). And the Executive itself has acknowledged that the Senate could "provide advice and consent on pending nominations during a pro forma session . . . ." OLC Memo, at 21. *See also supra* Parts II.D., II.E. Thus, the Senate's pro forma sessions satisfy all of the 1905 Senate Report's criteria for a valid Senate session.

C. President Reagan and Senator Byrd Shared the Understanding That Pro Forma Sessions Would Block Recess Appointments.

Senator Inhofe's account of negotiations between the Senate and the White House during the Reagan

Administration also indicates that pro forma sessions were regarded as valid sessions of the Senate under the Recess Appointments Clause. According to Senator Inhofe's comments in November 1999, Senator Robert Byrd wrote a letter to the White House in 1985 urging the President to desist making recess appointments. According to Senator Inhofe, Senator Byrd asked President Reagan

> to give the list to the majority leader in sufficient time in advance that [the Senate] could prepare for it either by agreeing in advance to the confirmation of that appointment or by not going into recess and *staying in pro forma so the recess appointments could not take place.*

145 Cong. Rec. 29,915 (1999) (Sen. Inhofe) (emphasis added). In response, President Reagan evidently agreed to notify the Senate of any contemplated recess appointments in advance. *Id.* Notably, Senator Inhofe's comments were made long before the Executive first contemplated the "novel" question, OLC Memo, at 4, of disregarding pro forma sessions for the purpose of making recess appointments.

The Executive has tried to explain this evidence by suggesting that Senator Inhofe misunderstood the nature of the agreement between Senator Byrd and President Reagan. Pet. Br. 57. Even if that were true, it would be beside the point. Whether Senator Inhofe's recollection of 1985 was accurate or not, his matter-of-fact description of those events is itself

powerful evidence that it was commonly understood in the 1980s and 1990s that pro forma sessions could block recess appointments. Nothing in his description suggests that Senator Byrd's threat to use pro forma sessions to block recess appointments was novel or in any other way remarkable. *See also* Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions* 11 n.44 (2013) (discussing evidence that "this practice was considered, but not implemented, during the 1980s and 1990s"), *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270DP%2BP%5CW%3B%20P%20%20%0A. In short, Senator Inhofe's comments afford substantial evidence that, up until January 2012, it was widely accepted by both branches that pro forma sessions prevent a "recess" within the meaning of the Recess Appointments Clause.

D. President Bush and Senator Reid Also Shared the Understanding That Pro Forma Sessions Would Block Recess Appointments.

Both the Legislative and the Executive Branches have continued to regard pro forma sessions as valid sessions in recent years, and both political parties have used them for that purpose. In 2007, Senate Majority Leader Harry Reid introduced the practice at issue in this case by causing the Senate to "com[e] in for pro forma sessions during the Thanksgiving holiday to prevent recess appointments." 153 Cong. Rec. S14609 (2007) (Sen. Reid); *see also* Henry B. Hogue & Maureen Bearden, Cong. Research Serv., RL33310, *Recess Appointments Made by President*

George W. Bush, January 20, 2001-October 31, 2008 6-7 (2008), *available at* http://www.fas.org/sgp/crs/misc/-RL33310.pdf (listing this and subsequent similar declarations by Senator Reid). Senator Reid's statements on this issue are particularly telling, because they provide the most contemporaneous expression of the effect of pro forma sessions by the person most clearly empowered by office to make this determination—namely, the Senate Majority Leader. President George W. Bush acknowledged the validity of pro forma sessions for this purpose, refraining from making any further recess appointments for the remainder of his term, despite an active history of making recess appointments prior to Senator Reid's change in Senate procedure. *See id.* at 6-7; Hogue, *Recess Appointments: Frequently Asked Questions*, *supra*, at 11, *available at* http://www.senate.gov/-CRSReports/crs-publish.cfm?pid=%270DP%2BP%5-CW%3B%20P%20%20%0A.

E. The Solicitor General's 2010 Letter Shared the Understanding That Pro Forma Sessions Would Block Recess Appointments.

Most recently, the Solicitor General acknowledged the efficacy of pro forma sessions in blocking recess appointments, in a letter to the Clerk of the Supreme Court in the case of *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). That case addressed the validity of an NLRB determination during a period in which the Board had only two members; subsequently, several vacancies were filled by recess appointments. *New Process Steel*,

560 U.S at 674. Because two vacancies on the NLRB had since been filled by recess appointment, the Court requested letter briefing addressing the effect, if any, of the later appointments on the disposition of the case before it. In the course of advising the Court on that question, the Solicitor General pointed out the likelihood that prolonged vacancies on the NLRB would recur, given the Senate's use of frequent pro forma sessions to prevent the President from making recess appointments:

> [G]iven the complexities and potential length of the Senate confirmation process, multiple vacancies [on the NLRB] could arise again in the future. Although a President may fill such vacancies through the use of his recess appointment power, as the President did on March 27 of this year, *the Senate may act to foreclose this option by declining to recess for more than two or three days at a time over a lengthy period.*

Letter from the Solicitor General to William K. Suter, Clerk, Supreme Court of the United States at 3 (April 26, 2010), *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010) (No. 08-1457), *available at* http://www.scotusblog.com/wp-content/uploads/2010/04/SG-letter-brief-NLRB-4-26-10.pdf (emphasis added). To be sure, as the OLC Memo points out, the Solicitor General did not purport in this letter to give this Court an opinion of the constitutional status of pro forma sessions. *See* OLC Memo, at 23. But it remains significant that

the Solicitor General, consistent with every other historical source, understood that pro forma sessions were indeed effective in disabling the President's power to make recess appointments, and advised this Court on the basis of that understanding.

***

In sum, the Senate's pro forma sessions constitute valid sessions of the Senate. When the Senate was meeting in pro forma sessions between December 17, 2011, and January 23, 2012, it was not in "recess" under the Recess Appointments Clause or any other Clause of the Constitution. Rather, the Senate was in session, and the President had no power to make recess appointments.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court affirm the judgment of the court below.

Respectfully submitted,

D. JOHN SAUER
Counsel of Record
SARAH E. PITLYK
MARY CATHERINE HODES
CLARK & SAUER, LLC
7733 Forsyth Boulevard
Suite 625
St. Louis, Missouri 63105
(314) 332-2980
jsauer@clarksauer.com

Counsel for Amici Curiae

November 25, 2013

AMICUS CURIAE BRIEF

No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* INDEPENDENCE INSTITUTE IN SUPPORT OF RESPONDENT NOEL CANNING AND AFFIRMANCE

SEAN R. GALLAGHER
Counsel of Record
BENNETT L. COHEN
JON R. DEDON
POLSINELLI PC
1515 Wynkoop St., Ste. 600
Denver, CO 80202
303-572-9300
sgallagher@polsinelli.com

DAVID B. KOPEL
INDEPENDENCE INSTITUTE
727 East 16th Ave.
Denver, CO 80203
303-279-6536

Counsel for Amicus Curiae Independence Institute

230692

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

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INTEREST OF THE AMICUS CURIAE[1]

The Independence Institute is a public policy research organization created in 1984, and founded on the eternal truths of the Declaration of Independence. It believes, as relevant here, that the Recess Appointments Clause should be interpreted consistently with the framers' understanding. The Independence Institute has participated as an amicus or party in many constitutional cases in federal and state courts. Its amicus briefs in District of *Columbia v. Heller* and *McDonald v. Chicago* (under the names of lead amicus ILEETA, the International Law Enforcement Educators & Trainers Association) were cited in the opinions of Justices Alito, Breyer, and Stevens. The Independence Institute's briefs in *NFIB v. Sebelius* explicated the original constitutional structure of federalism.

SUMMARY OF THE ARGUMENT

Both "the Recess" and close variants of "Vacancies that may happen" were standard terms in Founding-Era legislative practice, and appear copiously in legislative records. Those records inform us that "the Recess" means only the inter-session recess and that a vacancy "happens" only when it first arises. This brief collects and briefly discusses those records for the convenience of the Court.

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all amicus briefs.

The content of this brief is derived from a forthcoming law review article: Robert G. Natelson, *The Origins and Meaning of 'Vacancies that May Happen During the Recess' in the Constitution's Recess Appointments Clause*, 37 HARV. J.L. & PUB. POL'Y (forthcoming 2014) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257801).

ARGUMENT

I. INTRODUCTION

The Constitution's Recess Appointments Clause provides that "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. CONST. art. II, § 2, cl. 3. The D.C. Circuit below held that certain members of the NLRB had not been validly appointed under that Clause for two independent reasons. *See Noel Canning v. National Labor Relations Board*, 705 F.3d 490 (D.C. Cir. 2013). First, it held that the appointments took place while the Senate was in a "pro-forma" session, and that the Recess Appointments Clause only empowers the President to make recess appointments during an inter-session recess. *Id.* at 499-507. Second, the Circuit Court held that the Recess Appointments Clause requires that the vacancy arise during a recess, and not simply continue into a recess. *Id.* at 507-14.

Although the D.C. Circuit's conclusions are consistent with the original understanding of the Recess Appointments Clause, the opinion cited only two pre-ratification sources: a snippet from Federalist 67 and a provision of the 1776 North Carolina constitution. *See id.* at 500-01. This lack of pre-ratification support is representative of most writing

that has been done on the Recess Appointments Clause, which tends to focus on textual analysis of the Clause's language or post-ratification practice. *See, e.g.*, 1 U.S. Op. Atty. Gen. 631 (1823) (stating that "happen" may mean "happen to exist"). One reason for this is a paucity of discussion on the Recess Appointments Clause in familiar sources such as The Federalist. *See, e.g., Wilkinson v. Legal Services Corp.*, 865 F.Supp. 891, 897 (D. D.C. 1994) (stating, "It is difficult to ascertain the Framers' true intention in drafting the Recess Appointments Clause. There was little discussion and no debate on this provision at the Constitutional Convention. . . The only references to this Clause are Alexander Hamilton's comments [in FEDERALIST No. 67] that it should be used for 'temporary appointments' when 'it might be necessary for the public service to fill [a vacancy] without delay' and that it was intended as a 'supplement' to the Appointments Clause.").

Fortunately, there are plentiful pre-ratification materials probative of original understanding and original meaning. The Framers of the Constitution did not invent the phrases "the Recess" and "Vacancies that may happen." Both the first phrase and close variants of the second were stock terms from legislative and other governmental practice. Contemporaneous governmental records are powdered with them. Those records also disclose the meanings of both phrases to a high degree of certainty. Anyone with experience with contemporaneous legislatures would have known what they meant.

The legislature whose proceedings served as the source for legislatures in America was the British Parliament, particularly the House of Commons. PEVERILL SQUIRE, THE EVOLUTION OF AMERICAN LEGISLATURES: COLONIES,

TERRITORIES, AND STATES, 1619-2009 46 (2012) ("The rules and procedures initially used by the [colonial] assemblies were taken from English parliamentary practices."). Several founders, such as Benjamin Franklin and John Dickinson, had been directly exposed to Parliament's proceedings.[2] Books discussing parliamentary practice were freely available in America, among them Blackstone's Commentaries, DeLolme's Constitution of England, and popular English law books, such as Giles Jacob's New Law-Dictionary. *See* Robert G. Natelson, *The Legal Meaning of "Commerce" in the Commerce Clause*, 80 ST. JOHN'S L. REV. 789, 803-05 (2006), and sources cited therein.

Because American colonial legislative procedures were based on those of the House of Commons, they tended to be similar from state to state. Jack P. Greene, *The Role of the Lower Houses of Assembly in Eighteenth-Century Politics*, 27 J. SOUTHERN HISTORY 451, 458 (1961) (explaining the reasons for similarity in development of colonial legislatures) & 466 (lower houses of colonial legislatures often justified their actions by claiming that they were "agreeable to the practice of the House of Commons"). Those procedures tended to govern also the Continental Congresses (September 5, 1774 to March

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2. Franklin served in London as colony agent to the British government. J. A. Leo Lemay, Franklin, Benjamin, AMERICAN NATIONAL BIOGRAPHY ONLINE, at http://www.anb.org.weblib.lib.umt.edu:8080/articles/01/0100298.html?a=1&n=Franklin%2C%20Benjamin&ia=-at&ib=bib&d=10&ss=0&q=5.

Dickinson had studied at the Middle Temple in London, where he attended parliamentary debates. H. Trevor Colbourn (ed.), *A Pennsylvania Farmer at the Court of King George: John Dickinson's London Letters*, 1754-1756, 86 PA. MAGAZINE OF HISTORY & BIOGRAPHY 241 & 417 (1962).

1, 1781) and the Confederation Congress (March 2, 1781 to March 2, 1789), nearly all of whose members came from the legislatures of individual colonies and states. 26 J. CONT. CONG. 287-88 (U.S. Gov. Printing Off., 1937). Similar procedures governed the many inter-colonial and interstate conventions held during the Founding Era. *See* Robert G. Natelson, *Founding-Era Conventions and the Meaning of the Constitution's "Convention for Proposing Amendments,"* 65 FLA. L. REV. 615 (2013).

The records of these assemblies largely survive. As elucidated below, those records provide clear answers to the questions: (1) Does "the Recess" include intra-session breaks? and (2) does a vacancy arising during a session but continuing into "the Recess" thereby "happen" during the Recess? As explained below, the answer to both questions is "no."

II. THE MEANING OF "THE RECESS"

In common use, the term "recess" (without "the") meant only "A retreat, a withdrawment; a place of retirement, a secret abode; remission, a suspension of any procedure. . . ." JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775) (defining "recess"). In legislative practice, "recess" (without "the") could refer to any time when legislature not physically sitting, including intra-session breaks, and apparently even a noon recess. 1 THE REVOLUTIONARY RECORDS OF THE STATE OF GEORGIA 322 (Allen D. Candler, ed., 1908) ("This, the first legislature under the [state] constitution, was in session almost continuously, with an occasional recess, 'till the middle of September"). *See also* 1784-85 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE

PROVINCE OF MASSACHUSETTS BAY, at 818-19 (referring to "a short recess"); 3 LEGISLATIVE JOURNALS OF THE COUNCIL OF THE COLONY OF VIRGINIA 1336 (H. R. McIlwaine, ed., 1918) (Dec. 21, 1764) (reproducing the governor's message that he suggested "a recess" by adjournment rather than prorogation since he was "unwilling to impede the Business of the Session").

In contrast, in government practice the phrase "the Recess" always referred to the gap between sessions.

Numerous references in eighteenth century records support this conclusion. The sources refer to "the recess" specifically as the period between legislative sessions.

References to the period between sessions as "the Recess"

The Founding-Era record contains various references to "the Recess" as necessarily meaning the period between sessions, and in sharp contradistinction to the time the legislature was in session. William Blackstone wrote that "During the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward. . . But in the court of the lord high steward, *which is held in the recess of parliament*, he is the sole judge in matters of law. . . " 4 BLACKSTONE'S COMMENTARIES *260 (emphasis added). Blackstone also wrote of a grievance committee "established, lest there should be a defect of justice for want of a supreme court of appeal, *during the intermission or recess of parliament*; for the statute farther directs, that if the difficulty be so great, that it may not well be determined with the assent of parliament, it shall be brought by the said prelate, earls,

and barons unto the next parliament, who shall finally determine the same." 3 BLACKSTONE'S COMMENTARIES *57 (emphasis added). So according to Blackstone "the recess" was the time between "parliaments"—or, more precisely, parliamentary sessions. "The recess" did not denote times within a particular session. Similarly, another English writer observed that "The last recess of Parliament was a period filled with unprecedented troubles: and the Session opened in the midst of tumults." JOHN WESLEY, FREE THOUGHTS ON THE PRESENT STATE OF PUBLIC AFFAIRS 26 (1770).

In 1765, American lawmakers were asked to send delegates to what was later called the Stamp Act Congress. Lawmakers in some colonies were frustrated, however, because their governors had prorogued their assemblies. On September 6, 1765, Alexander Wyllys of Connecticut told a correspondent, "The General Assembly of this Province Stands Prorogued to the Twenty second day of October. . . it being in the recess of the General Assembly. . . ." *Quoted in* C.A. WESLAGER, THE STAMP ACT CONGRESS WITH AN EXACT COPY OF THE COMPLETE JOURNAL, 215-16 (Univ. Del. Press 1976). Thus, the prorogation, necessarily the end of the session, triggered "the recess." In Delaware, an informal caucus of lawmakers appointed their state's delegates because they did not have "it in our Power to Convene as a House" although they were "sensible of the impropriety of Assuming the Functions of Assembly Men, during the Recess of Our House. . . ." *Id.* at 92. In other words, during "the recess" the legislators were out of session.

The 1784 New Hampshire Constitution referred to the period since the last session as "the Recess":

> The President, with the advice of Council shall have full power and authority in the recess of the General-Court [legislature], to prorogue the same from time to time, not exceeding ninety days in any one recess of said Court; and during the session of said Court, to adjourn or prorogue it to any time the two houses may desire, and to call it together sooner than the time to which it may be adjourned, or prorogued . . . .

N.H. CONST. (1784) (article entitled "The Executive Power: President").

The legislative journals contain many references by which "the recess" is distinguished from the legislature's "sessions." For example, the New York legislative records report the phrase "the Recess" being employed exclusively to refer to periods when the legislature was not in session. *See, e.g.*, 1774 N.Y. J. GEN. ASSEM. at 84 (Mar. 7, 1774) (reciting an order "That the said Bill be postponed till the next Session; and that the Clerk of this House do in the Recess thereof . . . furnish the Parties Interested [certain documents]"). Similarly, the 1778 journal of the Virginia House of Delegates, tells us that the house

> Ordered, That the delegates for the several counties consult with their constituents, during the recess of Assembly, on the justice and expediency of passing [a designated] bill . . . and that they procure from them instructions, whether or not the said bill shall be passed, and lay the same before the House of Delegates *at their next session.*

1778 JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA 123 (Dec. 18, 1778) (emphasis added).

A resolution of the Massachusetts legislature adopted September 9, 1779 referred to "the Recess" of the state constitutional convention as the time after the convention's "late session." 21 MASS. COLONIAL RESOLVES 125 (reproducing the resolutions for adjourning the sessions of the superior Court, which referred to "said Convention at their late Session . . . [and a] Committee is enjoined to sit upon that Business on Monday next, and to compleat their Work during the Recess of the said Convention"). On March 24, 1788, the same legislature authorized a payment to a committee "appointed in the last Session . . . to sit in the recess." 1786-87 MASS. COLONIAL RESOLVES 855 ("Resolved, that there be allowed and paid out of the publick Treasury of this Commonwealth, to the Committee of Finance, appointed in the last Session of the General Court [the Massachusetts legislature], to sit in the recess"). A Massachusetts enactment providing for a vacancy appointment during "the Recess" explicitly referred to that period as occurring after the session. *Id.* at 523 ("in case a vacancy shall happen . . . in the recess of the General Court, or at so late a period in any session of the same Court, that the vacancy occasioned in any manner as aforesaid shall not be supplied in the same session thereof "). A Rhode Island legislative resolution also referred to the time following the session as "the recess." 10 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 122.

The legislative journals of New Hampshire are replete with legislative resolutions authorizing work to be done

"during the recess" with directions that the result of the work should be produced "before this house at the next session." *E.g.*, 8 DOCUMENTS AND RECORDS RELATING TO THE STATE OF NEW HAMPSHIRE DURING THE PERIOD OF THE AMERICAN REVOLUTION FROM 1776 TO 1783 469 (Jan. 18, 1777) (providing for committee to draw up fee schedule for officers during the recess, with production for the next session); 20 *id.* at 141 (Nov. 3, 1784) (referring to committee report recommending inquiry "in the recess" with a report "at the next session"); *id.* at 181 (Feb. 24, 1785) (same), 200 (Feb. 17, 1785) (providing for revision of fees "in the recess" with a report at "the next session"). Similar references appear at *id.* at 220, 506, 662 & 664 and 21 *id.* at 187, 222, 504, 562, 569-70, 604, 619, 721 & 730. Likewise, the period immediately before a new session was referred to as "the last recess." 8 *id.* at 768 (Feb. 13, 1778) (mentioning "the last recess" as the period immediately before the session, which had just obtained a quorum the day before). The New Hampshire records also refer to a petition being "be put over to the next Session of the General Court [legislature] and if the parties should not settle in the recess that [the petitioner] have leave to bring in a Bill at said next Session." 21 *id.* at 503-04 (Feb. 5, 1789). From references like these, it is clear that "the recess" represented the period between sessions and was clearly distinguished from them.

III. VACANCIES AND THE MEANING OF "HAPPEN"

A. The Use of "Vacancies That May Happen" Language in the Founding Era

The long-standing controversy involving the phrase "Vacancies that may happen" centers on the meaning of

the word "happen." Specifically, must the vacancy arise during the "the Recess" to "happen" then, or does it also "happen" if it arises during a session but extends into the recess? In other words, does "happen" mean not merely "arise" but also "happen to exist?"

In answering this question, an obvious place to start is with a full survey of Founding-Era dictionary definitions of "happen." This survey reveals that the "arise" meaning of "happen" is far more likely to be correct. William Perry's Royal English Dictionary, American edition, defined "happen" as "to come to pass; to light on"—phrases that certainly imply a discrete event rather than a continuing condition. WILLIAM PERRY, ROYAL STANDARD ENGLISH DICTIONARY (1st American edition, 1778). Similarly, Francis Allen's dictionary described "happen" as to "fall out, to come to pass, to light upon or meet with by chance." FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY (1765). John Ash's compendium stated, "To fall out, to come to pass, to light on by accident." JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775). Nathan Bailey and Edward Cocker offered only "to fall out." *See* NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (25th ed. 1783); EDWARD CROCKER, A NEW ENGLISH DICTIONARY (1713). Frederick Barlow's entry recited, "to fall out. To come to pass without being designed. To light upon or meet with by chance, or meer accident." FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY (1772-73). Comparable definitions—all implying a discrete event rather than a continuing situation—were reported by Alexander Donaldson, Samuel Johnson, William Kenrick, and Thomas Sheridan. *See* ALEXANDER DONALDSON, AN UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1763) ("to fall out; to chance; to

come to pass. To light; to fall by chance"); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (8th Ed. 1786) ("1. To fall out; to chance; to come to pass. 2. To light; to fall by chance."); WILLIAM KENDRICK, A NEW DICTIONARY OF THE ENGLISH LANGUAGE (1773) ("To fall out; to chance; to come to pass—To light; to fall by chance."); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1789) ("To fall out by chance, to come to pass; to light on by accident"). The only arguably-dissenting work was that by Thomas Dyche and William Pardon, which gave as a secondary definition (after "to come to pass") the phrase "to be." THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (1777).

What, then, of other documentary Founding-Era sources? In a very short examination of those sources, the D.C. Circuit wrote that the "North Carolina Constitution [contained] the state constitutional provision most similar to the Recess Appointments Clause and thus likely served as the Clause's model." 705 F.3d at 501.

Actually, the North Carolina language was not much like the Recess Appointments Clause: It neither referred to "the Recess" nor used any variant of the phrase "Vacancies that may happen:"

> That in every case where any officer, the right of whose appointment is by this Constitution vested in the General Assembly, shall, during their recess, die, or his office by other means become vacant, the Governor shall have power, with the advice of the Council of State, to fill up such vacancy, by granting a temporary commission, which shall expire at the end of the next session of the General Assembly

N.C. CONST., art. XX (1776). Several other state constitutions contained provisions for filling vacancies whose language was at least as similar to the Recess Appointments Clause: the constitutions of Georgia, Maryland, Massachusetts, New Hampshire (1784), Pennsylvania (1776), and South Carolina (1776 and 1778).

Like the North Carolina language, the provisions in the constitutions of Georgia, and South Carolina mentioned neither "the Recess" nor "Vacancies that may happen." *See* GA. CONST. (1777), art. XXI ("The governor, with the advice of the executive council, shall fill up all intermediate vacancies that shall happen in offices till the next general election; and all commissions, civil and military, shall be issued by the governor, under his hand and the great seal of the State."); S.C. CONST. (1776), art. XXIV ("in case of vacancy in any of the offices above directed to be filled by the general assembly and legislative council, the president and commander-in-chief, with the advice and consent of the privy council, may appoint others in their stead, until there shall be an election by the general assembly and legislative council to fill their vacancies respectively."). S.C. CONST. (1778), art. XXXI (same, with minor wording changes).

The Maryland instrument mentioned "the recess," but did not use the term "happen." *See* MD. CONST. (1776). art. XIII (stating that if there is a vacancy in one of the two treasurers' offices, "in the recess of the General Assembly, the governor, with the advice of the Council, may appoint and commission a fit and proper person to such vacant office, to hold the same until the meeting of the next General Assembly"); art. XLI (providing the same as to the register of wills); cf. art. XLVII (providing

for appointments of judges to fill certain vacancies, although legislative recess is not a triggering factor). The Massachusetts and 1784 New Hampshire instruments employed variants on the phrase "vacancies that may happen," but did not refer specifically to "the recess." *See* MASS. CONST. (1780), ch. 1, § 2, art. 4 ("and in like manner all vacancies in the senate, arising by death, removal out of the State, or otherwise, shall be supplied as soon as may be, after such vacancies shall happen."); N.H. CONST. (1784) (unnumbered part entitled "The Senate") ("and in like manner all vacancies in the Senate, arising by death, removal out of the State, or otherwise, shall be supplied as soon as may be after such vacancies happen"). N.H. CONST. (1784) (unnumbered part entitled "The Senate"). The Pennsylvania section authorizing the executive to fill vacancies in offices used neither the word "recess" nor "happen," but the section authorizing filling vacancies in the executive council did feature a variant of "vacancies that may happen." *Compare* PA. CONST. (1776), § 20 ("The president . . . shall supply every vacancy in any office, occasioned by death, resignation, removal or disqualification, until the office can be filled in the time and manner directed by law or this constitution.") *with* § 19 ("All vacancies in the council that may happen by death, resignation, or otherwise").

Although none of the state constitutions provided a direct model for the Recess Appointments Clause Founding-Era legislative records are replete with other provisions for filling vacancies, including grants of vacancy-filling authority during "the recess." They certainly were common enough to be familiar to anyone with any exposure to the legislative process. Specimens are extant from the Continental Congress. *See, e.g.*, 4 J.

CONT. CONG. 14 (Jan. 1, 1776) (resolving "That, in case of vacancy occasioned by the death or removal of a colonel or inferior officer, the provincial Congress of North Carolina, or, in their recess, the provincial Council, appoint another person to fill up such vacancy, until a commission shall issue from this Congress").

In addition, provisions exist for most of the states. For example:

- Connecticut: 2 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT 525 (1943) (granting power to the governor "by and with the advice of the Council of Safety in the recess of the General Assembly, to supply all vacancies that may happen by death or refusal of any commissary or commissarys appointed under this act"); 3 *id.* at 386 (1781 law stating that "That his Excellency the Governor be and he is hereby authorized and requested to fill up all vacancies which may happen by the refusal or resignation of any one of the committee appointed by this Assembly in their present sessions"); 5 *id.* at 37 (providing for collectors of duties to be "appointed by the General Assembly or in their Recess by the Governor and Council of this State").

- Delaware: MINUTES OF THE COUNCIL OF THE DELAWARE STATE, FROM 1776 TO 1792 1084 (1886) ("That in case of the death, inability, or refusal to act of the said Eleazar McComb, as State Commissioner as aforesaid, it is the opinion of the General Assembly that his Excellency the President, in their recess, appoint some other

suitable person to act as State Commissioner in the business").

- Georgia: 1 THE REVOLUTIONARY RECORDS OF THE STATE OF GEORGIA 345 (1908) ("that in case any of the Commissioners appointed . . . shall die, or resign their appointment, refuse or neglect to Act in the recess of the Legislature then the Governor and Council for the time being, are hereby Authorized and empowered to appoint some proper and discreet person or persons to act in the room or stead of any such person or persons, who shall or may die, or resign, refuse or neglect to Act as aforesaid").

- Massachusetts: 20 MASS. COLONIAL RESOLVES 646-47 ("the Honorable Council until the next sitting of the General Court, be and they hereby are fully authorized and impowered to nominate and appoint, as occasion may require, such commissioned officers . . . whose places by death or otherwise are or may in the recess of the General Court become vacant"); *id.* at 224, 540 & 717; 21 *id.* at 229 & 363 (all reproducing similar resolutions).

- New Jersey: LAWS OF THE STATE OF NEW JERSEY 102 (William Paterson, ed., 1800) (1790 statute empowering the governor to appoint U.S. Senators "during the recess of the legislature").

- North Carolina: 12 THE STATE RECORDS OF NORTH CAROLINA 99, 100 (1895) ("It is further Resolved that the Governor be impowered to

appoint at his discretion, officers to fill up such vacancies as may happen in the Continental Army aforesaid"); 24 *id.* at 443 ("That in case of the resignation or death of the comptroller, the supreme executive are hereby authorised and impowered to nominate a person to exercise the powers, and perform the duties of comptroler, during the recess of the General Assembly"); 24 *id.* at 553 (authorizing recess appointments of port collectors); *id.* at 654 (authorizing recess appointment of state treasurer).

- Pennsylvania: 1 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA 131 (Mar. 20, 1777) (authorizing president and council to make recess appointments).

- Virginia: 1777-78 VA. J. SENATE 8 (Oct. 21, 1778) (referring to a previous "appointment of the Governor and Council, made during the recess of the General Assembly").

Besides addressing vacancies that might occur during the recess, state legislatures sometimes enacted omnibus resolutions granting certain authority for "the recess." *E.g.*, 21 MASS. COLONIAL RESOLVES 122-23 (granting the executive council "until the next Sitting of the General Court," [the state legislature] the power to "nominate and appoint, as occasion may require . . . Officers in any of the Land Forces, armed Vessels or Vessels of War in the Service and Pay of this State, and also in the Militia, whose Places by Death or otherwise, are or may in the Recess of the Court become vacant").

The Constitution's expression "Vacancies that may happen" was but one variant of a group of stock phrases employed in these provisions. Although some do not tell us much about the meaning of "happen," many others do.

These documents confirm that "happen" always signified a discrete event. When legislators wished to designate a continuing vacancy rather than the creation of one, they did not use the unadorned word "happen." They resorted to phrases such as "during the Vacancy," 2 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 4, "are at present vacant," 12 STATE RECORDS OF NORTH CAROLINA 79, "if there be a vacancy," 12 STATE RECORDS OF NORTH CAROLINA 493, and "if at any Time . . . by Death or otherwise, the Offices . . . shall be vacant." 2 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 27.

B. How Founding-Era Documents Illustrate the Meaning of "Happen"

The Constitution itself offers an example of what it meant for a vacancy to "happen." This is located in Article I, Section 3: "if Vacancies happen by Resignation, or otherwise." Under the *ejusdem generis* rule of construction, the events contained in "otherwise" are presumed to be of the same kind as the example given ("Resignation")—that is, a discrete event. *See, e.g., Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) ("the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."). This is only one of scores of Founding-Era legal materials reciting illustrations of what it meant for a vacancy to "happen." All the illustrations discovered are discrete events—none represents continuance of a pre-existing vacancy.

Just as the U.S. Constitution cites the example of resignation, a Pennsylvania legislative resolution cites the example of death:

> *Resolved*, That where vacancies by death or otherwise may happen in any offices which ought to be filled by this house, during their recess, the president and council be hereby empowered to appoint suitable persons to fill the said offices till the same shall be appointed by the house.

1 JOURNALS OF THE HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA 131. Similar language appears in a 1777 Rhode Island resolution entrusting the electorate with the choice of that state's delegates to the Continental Congress. 8 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 179 (providing for popular election, but adding that "in case any vacancy shall happen, by death, or otherwise, the General Assembly shall fill up such vacancy for the remainder of the year.").

Other legislative measures provide multiple illustrations of how a vacancy might "happen." The Pennsylvania constitution offers two: "All vacancies in the council that may happen by death, resignation, or otherwise, shall be filled at the next general election. . . ." PA. CONST. (1776), § 19. A Connecticut resolution also has two:

> And be it further enacted, That his Excellency [the governor] be and he is hereby desired and impowered, by and with the advice of the

> Council of Safety in the recess of the General Assembly, to supply all vacancies that may happen by *death or refusal* of any commissary or commissarys appointed under this act . . . .

2 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 525 (italics added). Another Connecticut resolution lists four: "Provided always, That in case of death, resignation, refusal or revocation, the General Assembly may supply such vacancy as may so happen." *Id.* at 264. A 1784 message from the governor of Massachusetts had two examples: "During the recess of the General Court, there have happened [not "are happening"] two vacancies in the revenue department; one by death, and the other by resignation." 1784-85 MASS. COLONIAL RESOLVES 824.

Several 1785 South Carolina statues set forth instances of "happen." These also were limited to discrete events. A measure addressing the county courts provided that "if any vacancies shall happen by the death, resignation or removal out of the county of any of the said justices," then the remaining justices may "fill up such vacancies." THE PUBLIC LAWS OF THE STATE OF SOUTH CAROLINA 366 (John Faucheraud Grimke, ed. 1790). Another measure provided for the appointment of loan-office commissioners "if any vacancy shall happen by the death, resignation, or removal out of state" occurring "in the recess of the General Assembly." In such case, the governor with the advice of the Privy Council could "fill up such vacancy until the next meeting and sitting" of the legislature. *Id.* at 398. Still another enactment addressed vacancies among road commissioners that "shall happen . . . by refusal to act, death, removal out of the parish or district, or otherwise." *Id.* at 444.

Additional examples abound:

- Connecticut: 1 Acts And Laws Of The State Of Connecticut In America 39 (1786) ("That in Case of Death, Resignation, Refusal or Revocation, the General Assembly may supply such Vacancy as may so happen").

- Delaware: 2 Laws Of The State Of Delaware 851 (1797) (reproducing a 1786 law that has no "catchall" provision, but refers to "vacancy or vacancies that may happen by reason of such death or refusal to act."); *id.* at 893 (power to fill vacancies from death or resignation given to state president "in the recess of the General Assembly").

- New Hampshire: The Perpetual Laws Of The State Of New-Hampshire, From The Session Of The General-Court July 1776 To The Session In December 1788, Continued To The Present Year 1789 171 (John Melcher, 1789) (law adopted Feb. 7, 1789 referring to ("all vacancies . . . that shall happen by death, resignation, or otherwise"); 21 Documents And Records Relating To The State Of New Hampshire During The Period Of The American Revolution From 1776 To 1783 878 (1788 law providing for "if a Vacancy shall happen" due to an electoral defect).

- North Carolina: 19 The State Records Of North Carolina 543 (1784 legislative committee report recommending "That this State annually appoint their delegates to serve in Congress for one year. .

> . and when vacancies shall happen by the removal or resignation of any of the said Delegates within the year, this State shall appoint others in their stead").

- Pennsylvania: MINUTES OF THE PENNSYLVANIA GENERAL ASSEMBLY 1784-1788 413 (as paginated in supplement entitled "Laws Enacted in the Second Sitting of the Twelfth General Assembly of the Commonwealth of Pennsylvania commenced Feb. 19, 1787") ("That whenever any vacancy shall happen by death, refusal to serve, or other removal of one or more of the said trustees").

The foregoing examples illustrate that, at the time of the drafting and ratification of the Constitution, the framers intended, and the public likely understood, the word "happen" in the Recess Appointments Clause to refer to a discrete, rather than continuing event. Therefore, for a vacancy to "happen" during a recess, it must arise during that recess.

CONCLUSION

Founding-Era legislative and other governmental records tell us that the Constitution's phrase "the Recess" refers only to the formal recesses of the Senate between sessions. "The Recess" does not include other intermissions, pro forma or not. The records also inform us that for a vacancy to "happen" in "the Recess of the Senate," the vacancy must have arisen during that period. In other words, the predecessor's death, resignation, removal, retirement, or expiration-of-term must have occurred during the inter-session recess. If it occurs while the Senate is in session (pro forma or not), then the President may appoint only with the consent of the Senate.

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

SEAN R. GALLAGHER
Counsel of Record
BENNETT L. COHEN
JON R. DEDON
POLSINELLI PC
1515 Wynkoop St., Ste. 600
Denver, CO 80202
303-572-9300
sgallagher@polsinelli.com

DAVID B. KOPEL
INDEPENDENCE INSTITUTE
727 East 16th Ave.
Denver, CO 80203
303-279-6536

Counsel for Amicus Curiae Independence Institute

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AMICUS CURIAE BRIEF

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION IN SUPPORT OF RESPONDENT NOEL CANNING

ROBERT REMAR*
**Counsel of Record*
AMY ENDO
MORGAN RUSSELL
LEONARD CARDER, LLP
1188 Franklin St. #201
San Francisco, CA 94109
(415) 771-6400
rremar@leonardcarder.com

Counsel for Amicus Curiae

November 25, 2013

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INTEREST OF AMICUS CURIAE[1]

The International Longshore and Warehouse Union ("ILWU") is an unincorporated international labor union with more than 45,000 members among more than sixty local unions in California, Oregon, Washington, Alaska, and Hawaii. It represents public and private sector workers in a wide range of industries, including the longshore, warehousing, manufacturing, distribution, agriculture, trade, and service industries. The ILWU constitutes a "labor organization" within the meaning of section 2(5) of the National Labor Relations Act and has been subject to the jurisdiction of the National Labor Relations Board ("NLRB" or "Board") since the founding of the ILWU in 1937. Throughout this time, the NLRB has adjudicated countless labor disputes with profound and sweeping implications for the ILWU and its various bargaining relationships coast wide. The ILWU therefore has a strong interest in guaranteeing the integrity and legitimacy of the NLRB.

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[1] This brief is filed with the consent of the parties, all of whom have granted blanket consent to *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* ILWU affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made any monetary contribution to the preparation or submission of this brief. No person other than *amicus* or its counsel made any monetary contribution to the preparation or submission of this brief.

As a labor organization subject to the NLRB's jurisdiction, the ILWU has experienced firsthand the uncertainty that arises from constitutionally dubious Board appointments. The ILWU also has witnessed the politicized nature of Board appointments and the proclivity of various interest groups to adopt shifting positions regarding the recess appointment power depending on the political affiliation of the President. However, the ILWU consistently has asserted that there must be a firm constitutional footing for appointments to the Board and other administrative agencies. Most recently, the ILWU has challenged the President's putative recess appointments to the Board in several other cases before the NLRB and the Ninth Circuit Court of Appeals. The ILWU takes this position without regard to the existing political climate. The ILWU asserts that the decisions issued by the NLRB without the requisite three-member quorum are void *ab initio* and urges this Court to restore the stability and legitimacy provided by constitutionally sound Board appointments. Further, since the decisions rendered by the Board in the last two years have significant implications for the ILWU's collective bargaining relationships, the ILWU urges the Court to reject the notion that this case presents a non-justiciable political question and finally lay this issue to rest.

SUMMARY OF ARGUMENT

The ILWU submits this brief in support of Respondent Noel Canning and affirmance to urge

the Court to reach the merits of the case and finally to provide much-needed clarity regarding the proper scope of the Recess Appointments Clause. The ILWU agrees with the arguments advanced by Noel Canning and the reasoning of the Court of Appeals below. The D.C. Circuit rightly held that the Board appointments at issue here were an unconstitutional over-extension of the President's limited authority under the Recess Appointments Clause, in derogation of the Senate's confirmation power. The Court should restore certainty and legitimacy to the appointments process in general and to the NLRB in particular by declaring unconstitutional the purported recess appointments at issue here and holding void the decisions rendered by the Board while lacking a quorum of constitutionally-appointed members.

First, the Court should reject the suggestion that it reverse on justiciability grounds under the narrow "political question" doctrine. Certainly, the validity of recess appointments long has been a highly politicized issue. These political overtones have led partisan political actors to adopt shifting constitutional arguments favoring a more or less expansive interpretation of the Recess Appointments Clause depending on which political party has controlled the Presidency. Notably, the ILWU's support for Respondent Noel Canning cuts against the grain of such predictably politicized positions. Thus, it is fitting for the ILWU to respond to the assertion that the interpretive questions presently before the Court are non-justiciable. That argument ignores the distinction between the large class of

politically- and ideologically-charged cases routinely decided by this Court and the narrow class of cases raising genuinely "political questions" textually committed to one of the political branches and not resolvable by judicial standards. Despite the political posturing that typically has surrounded recess appointments, this case plainly does not fall into that exceptional latter category. Rather, this case is a dispute about the proper roles of the Executive and the Legislature in an appointments process that plainly is not textually committed to either branch acting alone. *See* U.S. Const. art. II, §2, cl. 2-3; *see also Freytag v. Comm'r*, 501 U.S. 868, 880 (1991) ("The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic."). The arguments on both sides of the issues involve the proper interpretation of the text and structure of the Constitution. The present case therefore is indistinguishable from the numerous weighty separation-of-powers decisions handed down by this Court, including in cases concerning the appointments process.

Second, the Court should reject the notion that the Founders intended the Recess Appointments Clause to serve as a political check on the Senate's confirmation power. Under the reimagining of the appointments process advanced by the Board and its supporters, the purported recess appointments at issue were valid responses to the Senate's exercise of its unquestionable authority to reject presidential nominations. This position ignores the narrowly circumscribed role that the Recess Appointments

Clause was intended to play as an alternative means of filling vacancies arising in the Senate's extended absence during the once-lengthy intersession Recess. As scholars have recognized, historical change has rendered this intended purpose less relevant. However, the Executive branch has purported to reengineer the Recess Appointments Clause as a potent political tool never intended by the Framers. The broad interpretation of the Recess Appointments Clause favored by the Board would make the recess appointment power a presidential trump card during inter-branch appointment disputes. From the Executive's perspective, this legally suspect device has served as a convenient response to Senate filibuster procedures that until recently required a supermajority to secure contentious confirmations. On November 21, 2013, however, the Senate voted "to eliminate the use of the filibuster against most presidential nominees."[2] This change demonstrates that there the political branches already possess sufficient *constitutional* means to address concerns regarding the appointments process, without resorting to unconstitutional manipulation of the Recess Appointments Clause.

The outsized view of the recess appointment power upon which the Executive based the Board

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[2] Jeremy W. Peters, Landmark Senate Vote Limits Filibuster, N.Y. Times (Nov. 21, 2013), http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html. "The filibuster changes[] . . . do not affect Supreme Court nominees. They would also not affect legislation, which would still be subject to a 60-vote threshold if filibustered." *Id.*

appointments at issue here impermissibly interferes with the Senate's clearly prescribed "full power to reject newly proposed appointees." *See Myers v. United States*, 272 U.S. 52, 121 (1926); *see also* Federalist No. 76 (Alexander Hamilton) ("[T]he necessity of [the Senate's] cooperation, in the business of appointments, will be a considerable and salutary restraint upon the conduct of [the President]."). Mere political expediency cannot legitimize exercises of presidential authority that conflict with the governmental structures and processes delineated in the Constitution. *See INS v. Chadha*, 462 U.S. 919, 945 (1983) ("[A]rguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers[] . . . and sets out just how those powers are to be exercised.").

Accordingly, the ILWU urges the Court to fulfill its duty to interpret and enforce the Constitution's textual requirements so as to maintain the system of checks and balances carefully woven into that document by the Framers. In order to do so, the Court first should reach the merits of the justiciable constitutional questions presented. The Court then should resolve those questions by disapproving firmly the Executive's expansive interpretation of the Recess Appointments Clause and reaffirming the import of the Senate's confirmation power as a considerable restraint and check on the President's appointment authority.

ARGUMENT

I. THE CONSTITUTIONALITY OF RECESS APPOINTMENTS IS A JUSTICIABLE QUESTION NOTWITHSTANDING THE POLITICIZED, PARTISAN DISCOURSE SURROUNDING SUCH APPOINTMENTS

In an *amicus curiae* brief filed in support of Petitioner, Prof. Victor Williams argues that the Court should reverse the court below because this case presents non-justiciable political questions. Respectfully, the Court should reject that invitation to expand the political question doctrine to reach this case, which presents issues requiring "interpretation of the Constitution[]" that squarely "fall[] within the traditional role accorded courts to interpret the law." *See Powell v. McCormack*, 395 U.S. 486, 548 (1969). In predictably cyclical fashion, political actors over the years have adopted first one side and then the other side of the legal arguments regarding the proper scope and meaning of the Recess Appointments Clause, depending only on which party controlled the White House. In this case, however, the Court finally can and should lay to rest these persistent debates by ensuring that NLRB appointees and other powerful executive officers receive their commissions in a manner consistent with the text and structure of the Constitution. As this Court stressed in a case presenting interpretive issues similar to those raised here, "the presence of significant political overtones does not automatically invoke the political question

doctrine." *INS v. Chadha*, 462 U.S. 919, 942-43 (1983). Rather, the history of partisan reversals on the legal issues merely underscores that this Court must fulfill its obligation to interpret the law and enforce the constitutional scheme of checks and balances embodied in the Senate's confirmation power.

As one respected commentator has observed, "[a] given interpretation [of the Recess Appointments Clause] may be good for your team at one point in history and bad at another." Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 Cardozo L. Rev. 443, 443 (2005). As Prof. Herz has noted more recently, the "ideologically tinged" "battle over the four January 2012 appointments is highly politicized."[3] Republican senators publicly have labeled President Obama's purported recess appointments as a "blatant attempt to circumvent the Senate and the Constitution"[4] and "surely not what the framers had in mind when they required the President to seek the advice and consent of the Senate in making appointments."[5] For years, however, "members of

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[3] Michael Herz, The challengingly uncategorizable Recess Appointments Clause, SCOTUSblog (Jul. 15, 2013). http://www.scotusblog.com/2013/07/167445/.

[4] Senate Minority Leader Mitch McConnell (R-Ky.), *quoted in* A Constitutional Conflict in the Opening Days of the New Congressional Session, NAW News (Jan. 2012), http://www.naw.org/nawnews/news_article.php?articleid=646.

[5] Sen. Chuck Grassley (R-Iowa), *quoted in* Lachlan Markay, *Grassley Not Buying DOJ's Non-Recess Appointment Apologia*, The Foundry (Jan. 12, 2012),

Congress from both parties have accused the President of abusing his power by using the Recess Appointments Clause, despite its considerable use by both Democratic and Republican Presidents." Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 Cal. L. Rev. 235, 236-37 (2008). Thus, in many ways, "the current battle is a rehash of fights during the George W. Bush administration, just with the party affiliations flipped."[6] Indeed, Democratic Senators raised similar complaints regarding President Bush's recess appointments. Late Democratic Senator Edward Kennedy labeled the former President's 2005 recess appointment of John R. Bolton as United Nations Ambassador an "abuse [of] the recess appointment power" and "a devious maneuver that evades the constitutional requirement of Senate consent."[7] Notably, Senator Kennedy also filed *amicus* briefs with this Court and the Eleventh Circuit in litigation challenging the recess appointment of Judge William Pryor. The Senator raised essentially the same interpretive arguments now advanced by Noel Canning and

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http://blog.heritage.org/2012/01/12/grassley-not-buying-dojs-non-recess-appointment-apologia/#.UoZ5hqjTlaQ.

[6] Herz, *supra* note 3.

[7] Sen. Edward Kennedy (D-Mass.), *quoted in* Bush Appoints Bolton to U.N. Job, FoxNews.com (Aug. 1, 2005), http://www.foxnews.com/story/2005/08/01/bush-appoints-bolton-to-un-job/.

amici Republican Senators.[8] In this same tradition, Republican Senators previously had argued that recess appointments made by President Clinton constituted "treat[ing] the Senate confirmation process as little more than a nuisance which [the President] can circumvent whenever he wants" contrary to "the intent of [the] Constitution"; and an "outrageously inappropriate . . . effort to bypass the Senate." Hein, *In Defense of Broad Recess Appointment Power*, 96 Cal. L. Rev. at 237.

Because *amicus* ILWU is an intensely principled labor union, the ILWU's position – advanced not only here but consistently in other litigation before the Ninth Circuit and the NLRB – represents a marked departure from the predictable pattern of expedient party- and ideology-driven approaches to the issues presented in this case. As explained above, *amicus* is affected profoundly by the instability and illegitimacy that arises when this or any President makes constitutionally infirm recess appointments to the NLRB. The ILWU currently faces the prospect of entering into collective bargaining negotiations with a deep lack of confidence in the legitimacy of numerous Board rulings. This crisis of legitimacy is particularly acute at present in light of the Executive's reliance on an unprecedented legal position to justify the President's recess appointments despite the Senate's maintenance of pro forma sessions during the period in question. *See*

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[8] *See, e.g.*, Brief of Amicus Curiae Edward M. Kennedy in Support of Petitioner, Franklin v. United States, No. 04-5858, *cert. denied*, 125 S. Ct. 1636 (Mar. 21, 2005).

Memorandum Opinion for the Counsel to the President, Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions (Jan. 6. 2012) ("conclud[ing] that . . . Congress [cannot] prevent the President from making any recess appointments . . . by conducting pro forma sessions" but acknowledging that "[t]he question is a novel one, [with] substantial arguments on each side");[9] *cf. Wright v. United States*, 302 U.S. 583, 597-98 (1938) ("[T]he precedents of executive action which have been cited are not persuasive. The question now raised has not been the subject of judicial decision and must be resolved not by past uncertainties, assumptions, or arguments, but by the application of the controlling principles of constitutional interpretation."). The predictably partisan manner in which political actors heretofore have endorsed different interpretations of the Recess Appointments Clause simply underscores the need for this Court to finally and authoritatively settle the matter. That these recurring interpretive debates inevitably carry political overtones does not support a determination that the fundamental interpretive questions are non-justiciable under the political question doctrine. To the contrary, application of the political question doctrine here would contravene the consistent teachings of this Court's precedents.

The Court recently reaffirmed that the political question doctrine is but "a narrow exception to th[e]

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[9] *Available at* http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf.

rule" that "[i]n general, the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (quoting *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)). Moreover, the Court repeatedly has distinguished between the mine run of justiciable controversies that involve contentious "political" dimensions and the comparatively narrow class of claims that must be held non-justiciable under the political question doctrine. The Court spelled out this distinction in *Chadha*, in which the Court was asked to consider "the important question of the constitutionality of the one-House veto," 462 U.S. at 929, and rejected a political question argument similar to that advanced here:

> It is correct that this controversy may, in a sense, be termed "political." But the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications . . . . *Marbury v. Madison* was also a "political" case, involving as it did claims under a judicial commission alleged to have been duly signed by the President but not delivered. But "courts cannot reject as 'no law suit' a bona fide controversy as to whether

> some action denominated 'political' exceeds constitutional authority."

Id. at 942-43 (citations omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). Likewise, the *Baker* Court explained that "[t]he doctrine . . . is one of 'political questions,' not one of 'political cases.'" 369 U.S. at 217. While this case perhaps may be described fairly as a "political" one, a review of this Court's precedents demonstrates that it does not present non-justiciable political questions.

This Court "ha[s] explained that a controversy 'involves a political question . . . where there is a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky*, 132 S. Ct. at 1427. Unless these factors are "inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Baker*, 369 U.S. at 217. Neither of these critical factors applies here. Nor would the Court's resolution of the questions presented "express[] lack of the respect due coordinate branches of government." *See id.*

First, resolution of the interpretive issues presented in this case is not textually committed to either political branch. The questions here presented concern the interplay of several related constitutional provisions relevant to the appointment process, implicating powers committed to the Senate as well as the President. This Court has explained that the "[t]he structural principles

embodied in the Appointments Clause do not speak only, or even primarily, of Executive prerogatives simply because they are located in Article II." *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991). Rather, the Court has described "[t]he [Appointments] Clause [as] a bulwark against one branch aggrandizing its power at the expense of another branch." *Ryder v. United States*, 515 U.S. 177, 182 (1995) (quoting *Freytag*, 501 U.S. at 878)). As with these other cases raising constitutional issues involving the appointment process, this case will require the Court to interpret the Constitution's text and structure so as to articulate the separation of powers between the Executive and the Legislature. Although always a serious task, refereeing these constitutional boundaries falls within the core competency and obligation of the Judiciary. *See, e.g.*, *Freytag*, 501 U.S. at 870, 873 ("In this litigation, we must decide whether the authority that Congress has granted the Chief Judge of the United States Tax Court to appoint special trial judges transgresses our structure of separated powers. . . . We granted certiorari to resolve the important questions the litigation raises about the Constitution's structural separation of powers.")

Second, and relatedly,[10] there are familiar, "judicially . . . manageable standards," *see Baker*,

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[10] "[T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it[] . . ." *Nixon v. United States*, 506 U.S. 224, 228 (1993).

369 U.S. at 217, for interpretation of the Constitution's text and structure. Just last year, this Court declared that a case will not be held to "turn on standards that defy judicial application" where the arguments advanced "sound in familiar principles of constitutional interpretation." *Zivotofsky*, 132 S. Ct. at 1430. When "[r]esolution of [a] claim demands" nothing more than "careful examination of the textual, structural, and historical [arguments] put forward by the parties," the "claim presents issues the Judiciary is competent to resolve." *Id.* This is in part because "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." *Chadha*, 462 U.S. at 946 (quoting *Buckley v. Valeo*, 424 U.S. 1, 124 (1976)). "The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers[] . . . ." *Id.* As one scholar has explained: "While the recess appointments power can obviously be partisan in the short run, in the long run it concerns nonpartisan matters about the allocation of constitutional authority and checks and balances."[11] Such cases present justiciable controversies – even if ultimately "reaching a decision . . . is [not] simple."

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[11] Michael B. Rapapport, The originalist and non-originalist cases for following the original meaning of the Recess Appointments Clause, SCOTUSblog (July 15, 2013), http://www.scotusblog.com/2013/07/symposium-the-originalist-and-non-originalist-cases-for-following-the-original-meaning-of-the-recess-appointments-clause/.

See Zivotofsky, 132 S. Ct. at 1430; *see also United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) ("Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances."). As the *Zivotofsky* Court aptly stated, addressing and resolving such closely contested disputes "*is what courts do.*" 132 S. Ct. at 1430 (emphasis added).

Moreover, the Court specifically has emphasized the justiciability of challenges raised by individual parties affected by the decisions of constitutionally suspect appointees. *See Ryder*, 515 U.S. at 177-78 ("[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule would create a disincentive to raise Appointments Clause challenges with respect to questionable . . . appointments.") (internal citation omitted); *see also Bond v. United States*, 131 S. Ct. 2355, 2365 (2011) ("In the precedents of this Court, the claims of individuals – not of Government departments – have been the principal source of judicial decisions concerning separation of powers and checks and balances. . . . If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object. ").

Finally, as the Court explained in *Powell v. McCormack*, "an interpretation of the Constitution" such as that called for here "falls within the traditional role accorded courts to interpret the law, and does not involve a 'lack of the respect due [a] coordinate [branch] of government.'" 395 U.S. at 548 (alterations in original). "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Id.* at 549.

For these reasons, the Court should refuse to extend the appropriately narrow political question doctrine so as to avoid deciding the important and recurring issues squarely presented by this case. Indeed, it is incumbent upon the Court to reach the merits and – finally – to set forth an authoritative interpretation of the Recess Appointments Clause, in accordance with the "duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). As explained in the second section of this brief, the Court should resolve the questions presented so as to reaffirm the Senate's considerable role as a check on the President in the appointment process.

II. THE RECESS APPOINTMENTS CLAUSE DOES NOT PERMIT THE PRESIDENT TO TRUMP THE SENATE'S POWERFUL ROLE IN THE APPOINTMENT PROCESS

This Court has long recognized that "the greatest security against tyranny – the accumulation of excessive authority in a single Branch – lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Mistretta v. United States*, 488 U.S. 361, 381 (1989). As articulated by James Madison, this system was designed to "giv[e] to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." Federalist No. 51 (James Madison). Thus, the system of checks and balances that the Constitution places on each branch of government serves as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley*, 424 U.S. at 122.

Madison explained that the division of power among the branches provides "security [that] arises to the rights of the people." Federalist No. 51. Thus, separation of powers does not serve only to protect each branch of government from the others. *See Bond*, 131 S. Ct. at 2365 ("Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern."). Rather, "[t]he structural principles secured by the

separation of powers protect the individual as well." *Id.*; *see also United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) ("This Court has repeatedly emphasized that 'the Constitution diffuses power the better to secure liberty.'" (quoting *Morrison v. Olson*, 462 U.S. 654, 694 (1988))).

The Constitution's appointment provisions form an important part of this carefully constructed system of checks and balances. These provisions divide the appointment power between the President and the Senate. *See* U.S. Const. art. II, § 2, cl. 2-3. This Court has explained that the "structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic," such that "[n]either Congress nor the Executive can agree to waive this structural protection." *Freytag*, 501 U.S. at 880 (1991). This case addresses specifically the role of the Recess Appointments Clause within this structural framework. As one legal scholar has observed, "the recess appointments power . . . concerns . . . the allocation of constitutional authority and checks and balances."[12]

This Court is obligated to enforce the checks and balances set in place by the Framers and to prevent the President from circumventing the Senate's structural role in the appointment process. As explained by Justice Kennedy:

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[12] Rappaport, *supra* note 11.

> [A]s to the particular divisions of power that the Constitution does in fact draw, we are without authority to alter them, and indeed we are empowered to act in particular cases to prevent any other Branch from undertaking to alter them.

Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring).

The Founders carefully and deliberately designed the appointment provisions to avoid the aggrandizement of the Executive's authority over appointments by giving the Senate "full power to reject newly proposed appointees." *Myers*, 272 U.S. at 121. Alexander Hamilton made clear that the Senate's role of providing ultimate approval was critical to the appointment process:

> It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

Federalist No. 76. According to Hamilton, "the necessity of [the Senate's] cooperation, in the business of appointments, w[ould] be a considerable and salutary restraint upon the conduct of [the President]." *Id.* Specifically, "the power of appointment by the executive is restricted in its exercise by the provision that the Senate, a part of

the legislative branch of the government, may check the action of the executive by rejecting the officers he selects." *Myers*, 272 U.S. at 119. Indeed, because the Appointments Clause grants the Senate this considerable check over appointments and thereby "articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests." *Freytag*, 501 U.S. at 880; *see also Weiss v. United States*, 510 U.S. 163, 185-86 (1994) (Souter, J., concurring) ("[B]ecause exclusive Presidential appointment power 'may be abused,' the Appointments Clause provides the 'salutary check' of Senate confirmation, and '[t]he consciousness of this check will make the president more circumspect, and deliberate in his nominations for office.'" (second alteration in original) (quoting 3 J. Story, Commentaries on the Constitution of the United States 374-377 (1833))).

As this Court has stated, "[t]he 'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances against executive power because 'the power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism.'" *Freytag*, 501 U.S. at 883 (quoting G. Wood, The Creation of The American Republic 1776–1787, at 79, 143 (1969)). As Justice Souter previously observed, several Founders, including Benjamin Franklin, "expressed concern over the threat of expanding Presidential power[] . . . specifically in the context of appointments." *Weiss*, 510 U.S. at 187 n.2 (Souter, J., concurring); *see also id.* at 185 n.1 ("Gouvernor Morris, who was among

those initially favoring vesting exclusive appointment power in the President, ultimately defended the assignment of shared authority for appointment on the ground that 'as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security.'"). "Indeed, the Framers added language to both halves of the Appointments Clause specifically to address the concern that the President might attempt unilaterally to create and fill federal officers." *Id.* at 187 n.2. "Thus, the Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers . . . between the Executive and Legislative Branches." *Freytag*, 501 U.S. at 884. It is therefore clear that the prospect of executive usurpation of legislative authority in the appointment process was a serious concern that the Framers sought to address when drafting the appointment provisions. *See id.* ("Even with respect to 'inferior Officers,' the [Appointments] Clause allows Congress only limited authority to devolve appointment power on the President, his heads of departments, and the courts of law.").

It follows that the Court should not interpret the Recess Appointments Clause so as to undermine the Senate's legitimate structural power to impose "considerable . . . restraint" on the President's appointment preferences, absent some basis in the Constitution itself. *See* Federalist No. 76. Instead, the relevant authorities confirm that the Framers intended the Recess Appointments Clause as a narrow, pragmatic exception to the general Advice and Consent requirement. Thus, Hamilton

explained that the Recess Appointments Clause is "nothing more than a supplement . . . for the purpose of establishing an auxiliary method of appointment, in cases to which the general method [is] inadequate." Federalist No. 67 (Alexander Hamilton). Hamilton continued:

> The ordinary power of appointment is confined to the president and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers and as vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments "during the recess of the Senate," by granting commissions which shall expire at the end of their next session.

Id. Hamilton's characterization of the joint appointment procedure as the "*ordinary* power of appointment" demonstrates that this joint procedure was intended to be the general rule, while the unilateral recess appointment procedure would be an exception to that rule. Moreover, Hamilton clearly contemplated that this exception was to be invoked in very specific circumstances, i.e., when a vacancy happens while the Senate is in its recess.

In an *amicus curiae* brief filed in support of the Petitioner, however, the Brennan Center for Justice ("Brennan Center") argues that the recess appointment power has evolved to serve a politically useful function as a "check on partisan obstructionism" committed by the Senate when it "prevent[s] the President from appointing officers of his choosing."[13] However, neither the text of the Constitution, founding era authorities, nor this Court's precedents support the theory that the Recess Appointments Clause was intended as some sort of counter-check to the Senate's "full power to reject newly proposed appointees." *See Myers*, 272 U.S. at 121. To the contrary, as Hamilton made clear in Federalist No. 67, the Clause was intended as a mere auxiliary measure to be employed to fill vacancies arising during the Senate's absence.

Thus, proponents of an expansive reading of the Recess Appointments Clause seek to have the Clause serve a function far broader than the narrow

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[13] *See* Brief of Amicus Brennan Center 19. The Brennan Center's brief states that the organization's ultimate concern is with Senate filibuster rules and the use of the filibuster to frustrate executive branch nominations. *See, e.g., id.* at 1 (explaining the Brennan Center's interest in the case as stemming from the organization's "role in . seeking to curb abuses of the filibuster rule"); *id.* at 26 (stating that "this case relates to dysfunction created by filibusters affecting executive officers"). As the Senate's recent decision to revise its procedures to eliminate filibustering of most nominations demonstrates, political and policy arguments regarding Senate rules properly are addressed to that body. The wisdom of such filibuster reforms is not at issue here.

purpose for which it originally was intended. Under a faithful interpretation, however, the role of the Clause should be waning in the modern era, rather than waxing under aggressive theories of Executive power. Scholars have recognized that the main factor bearing on the originally intended role of the Recess Appointments Clause has been that "modern transportation and the change in the frequency with which the Senate meets render the clause an anachronism." Herz, *Abandoning Recess Appointments*, 26 Cardozo L. Rev. at 454. The Clause was designed to provide a mechanism by which the President could make temporary appointments while the Senate was out of town during long annual recesses.[14] However, the Senate now holds between seven and twelve recesses per year, with most recesses lasting less than two weeks. The Senate is no longer unavailable to perform its appointment functions due to extended recesses: "[it] is simply never out of session long enough for a vacancy[] . . . truly to need filling before its return." Herz, *Abandoning Recess Appointments*, 26 Cardozo L. Rev. at 454. Rather, as Prof. Herz aptly observed, "[i]t is simply impossible to justify modern uses of the Recess Appointments Clause in terms of its original purpose"; indeed, "no one could suggest with a straight face that [such] recent recess

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[14] "In the early years under the Constitution, intersession recesses typically lasted between six and nine months and therefore recess appointments were needed to prevent important offices from remaining unfilled during these long periods." Michael B. Rappaport, The Original Meaning of the Recess Appointments Clause, 52 UCLA L. Rev. 1487, 1491 (2005).

appointments . . . [are] in any way related to the clause's underlying purposes." *Id.* at 454-55. Indeed, "if any urgency exist[s], it [is] created not by the Senate's *absence* but by its imminent *return*; a physical inability to act [is] hardly the problem." *Id.* While *amicus* is not insensitive to the political challenges of divided government, the Senate's exercise of its express constitutional authority to restrain the President's appointment preferences cannot justify the President's unconstitutional abuse of the recess appointment power. The Recess Appointments Clause simply was not designed to serve as a presidential trump card to overcome this type of political gridlock.

Here, the President's actions well exceeded the scope of executive authority under the Recess Appointments Clause. Admittedly, other Presidents also have invoked broad interpretations of the Clause in recent years, although none had gone so far as the current Administration. Indeed, "[e]very modern recess appointment has occurred at most a couple of weeks, and in some cases a couple of days, before the Senate's return – and usually after the nomination had been stalled for months."[15] However, as in other circumstances in which this Court has declined to find such "precedents of executive action . . . persuasive," "[t]he question now raised has not been the subject of judicial decision and must be resolved not by past uncertainties, assumptions, or arguments, but by the application of the controlling principles of constitutional

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[15] Herz, *supra* note 3.

interpretation." *See Wright*, 302 U.S. at 597-98. Indeed, the increasingly aggressive use of recess appointments in recent years makes this Court's intervention all the more critical. *See Chadha*, 462 U.S. at 944 ("[O]ur inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies."). Allowing the President to employ the Recess Appointments Clause to strategically circumvent the Senate's confirmation power in this manner defeats the structural benefits that the appointments provisions were designed to provide. The Court must decisively end the practice.

Proponents of a more expansive interpretation of the Recess Appointments Clause attempt to minimize their position's fundamental constitutional defects by asserting that the President's use of the recess appointment power outside of its original context ensures that vacancies may be filled during recesses. However, this view "ignores that the Recess Appointments Clause was designed both to allow vacancies to be filled *and to restrain Presidents from circumventing the Senate*." Michael B. Rappaport, The Original Meaning of the Recess Appointments Clause, 52 UCLA L. Rev. 1487, 1542 (2005) (emphasis added). Under the interpretation advanced by Petitioner, the President can fill any existing vacancy regardless of when it arose by waiting deliberately until a recess occurs. By contrast, an interpretation that limits the recess appointment power to vacancies that arise during the recess in question "would have allowed the

President historically to fill virtually all significant vacancies that could not have been addressed by the Senate, without eviscerating the requirement of senatorial consent in other cases."[16] The Recess Appointments Clause should be interpreted in a manner that does not undermine structural interests served by a joint appointment process.

A decision reaffirming the intended, narrow scope of the Recess Appointments Clause simply requires the Senate and the President to sort out their differences regarding executive appointments through constitutional means within the political process. Under the appointments scheme created by the Framers, the political branches have at their disposal sufficient *constitutional* means for resolving such disputes, as well as powerful political incentives for doing so. *See Freytag*, 501 U.S. at 884 ("The Framers understood[] . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people."); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010) ("The Framers created a structure in which '[a] dependence on the people' would be the 'primary control on the government.'" (alteration in original) (quoting Federalist No. 51)). The Senate's recent decision to eliminate filibustering of most presidential nominations demonstrates the capacity of the political branches to wield their *constitutional* powers to address policy concerns regarding purported dysfunction in the

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[16] Rappaport, *supra* note 11.

appointments process. There simply is no need to resort to unconstitutional methods, as the President did here.

Moreover, even otherwise compelling appeals to political utility and efficiency could not legitimize the President's unconstitutional appointments. As this Court previously has explained, "[c]onvenience and efficiency are not the primary objectives – or the hallmarks – of democratic government." *Chadha*, 462 U.S. at 944. Accordingly, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Id.*; *cf. New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2645 (2010) (holding that legislation "provid[ing] for a Board quorum of three[] must be given practical effect rather than swept aside in the face of admittedly difficult circumstances," such as "the costs that delay imposes on . . . litigants"). *Amicus* Brennan Center asks the Court to embrace its view that the President may invoke the Recess Appointment as a "structural check on Senate obstruction,"[17] despite the lack of any constitutional foundation for this position. However, a policy preference for a less combative appointment process and speculative gains in "eliminat[ing] government dysfunction and gridlock,"[18] cannot trump the plain text and purposes of the Constitution. *See Chadha*, 462 U.S.

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[17] Amicus Brief of Brennan Center 19.

[18] *Id.* at 1.

at 945 ("[P]olicy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution."); Herz, *Abandoning Recess Appointments*, 26 Cardozo L. Rev. at 457-58 ("If purposive interpretation differs from mere consideration of policy, it is because of the lawmaking authority of the original enactors. Once we exchange *their* purposes for ours, we are invoking policy alone." (footnote omitted)). The Court should decline the invitation from the Board and its supporters to breathe artificial life into the Recess Appointments Clause.

CONCLUSION

For the foregoing reasons, *amicus curiae* ILWU urges the Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

ROBERT REMAR*
**Counsel of Record*
AMY ENDO
MORGAN RUSSELL
LEONARD CARDER, LLP
1188 Franklin St. #201
San Francisco, CA 94109
(415) 771-6400
rremar@leonardcarder.com

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

NOV 2 7 2013

No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD
PETITIONER,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP.
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING

Paul J. Orfanedes
Counsel of Record
Ramona R. Cotca
JUDICIAL WATCH, INC.
425 Third Street, S.W., Ste. 800
Washington, DC 20024
porfanedes@judicialwatch.org
(202) 646-5172
Counsel for Amicus Curiae

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INTEREST OF THE *AMICI CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly monitors significant developments in the court systems and the law, pursues public interest litigation, and files *amicus curiae* briefs on issues of public concern. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

Amici have an interest in promoting the rule of law and are concerned the President's alleged Recess appointments to the National Labor Relations Board

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been filed with the Clerk.

("NLRB" or "Board") disrupt the deliberate balance of powers intended by the Framers.

The issue before the Court is of great importance to the principles secured by the separation of powers that are engrained in the very fabric of the Constitution. Recess appointments by past Presidents on political whims have created confusion; however, these past abuse are irrelevant because the text is clear as to its meaning. The recess appointment process exceeds political interest of any one administration and requires application consistent with the Framers' intent that the Senate act as a constitutional check on the President's power to appoint.

SUMMARY OF THE ARGUMENT

The President's alleged Recess appointments to the NLRB are unconstitutional for the primary reason that the Senate was in session at the time of the purported appointments. The Senate alone can determine when it will hold session in conformity with its obligations and delegated powers by the Constitution. Its order to convene on the specified dates through January 20, 2012 is within its authority, and the Executive cannot deem the sessions invalid. The principles of separation of powers and checks and balances on which the Constitution was based prohibit it. Additionally, the textual interpretation of Article II, §2 and the Framers' original writings before the ratification of the Constitution demonstrate that the Recess Appointment Clause was intended to preserve the Senate's advice and consent power, rather than limit it, and Recess

appointments are only appropriate during an intersession recess.

ARGUMENT

I. THE CONSTITUTIONAL TEXT IS CLEAR AND CONSISTENT WITH THE FRAMERS' INTENT THAT RECESS APPOINTMENTS ARE RESTRICTED TO *THE RECESS* BETWEEN SENATE SESSIONS.

The Framers debated the appointment power at the constitutional convention, and what checks and balances it should include, if any. In their effort to persuade ratification of the Constitution, the Framers explained their intent to form a government of checks and balances.

> In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; *and in the next place oblige it to control itself.* A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all of the subordinate distributions of power, *where the constant*

> *aim is to divide and arrange the several officers in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights.*

(emphasis added) The Federalist No. 51 (A. Hamilton or J. Madison). The Framers' regard for checks and balances was similarly evident in the construction of the appointment powers contained in section 2 of Article II. "The ordinary power of appointment is confined to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate." The Federalist No. 67 (A. Hamilton). Alexander Hamilton, who vigorously defended the cause of ". . . an energetic executive," asked "[t]o what purpose then require the co-operation of the Senate?" The Federalist 70 (A. Hamilton); The Federalist No. 76 (A. Hamilton). He further explained:

> It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. In addition to this, it would be an efficacious source of stability in the administration.

The Federalist 76 (A. Hamilton).

Hence, the question of constitutionality of the President's purported Recess appointments to the NLRB surpasses the interest of a few appointments to the Board. The stakes are high to the public, as well as to the structural principles of separation of powers when presidential appointments attempt to eliminate the constitutional checks and balances established in the appointment clause. As the Court noted in *Freytag v. Commissioner*, "[t]he structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic. 501 U.S. 868 (U.S. 1991); *see also INS v. Chadha*, 462 U.S. 919, 942 (1983); *Bond v. United States*, 564 U.S. __, 131 S. Ct. 2355, 2365 (2011). The President's purported Recess appointments, despite the Senate's unanimous agreement to meet every three days, disturb the constitutional checks that were deliberately inserted by the Framers in the Appointments Clause.

The Constitution defines the President's appointment power as follows in Section 2 of Article II.

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors...and all other Officers of the United States, whose Appointments are not herein otherwise provided for . . .
>
> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Com-

> mission which shall expire at the End of their next session.

U.S. Const., Article II, § 2, clauses 2-3.

Consistent with Alexander Hamilton's discourse on the benefits of having a constitutional check on the Executive's appointment power, the Senate is granted advice and consent power to presidential appointments. The Recess Appointment Clause further provides a limitation on the President's appointment power to temporary commissions for vacancies *that happen during the Recess* and which *shall expire at the End of their next session*. The plain meaning and constitutional history examined through the Framers' writings on the appointment process make it apparent that the Framers intended to preserve the Senate's advice and consent power in the appointment process by confining the Executive's authority to make temporary appointments during inter-session recesses only.

The U.S. Court of Appeals for the District of Columbia Circuit correctly held that the text of the Recess Appointment Clause is clear: Recess appointments are only permissible during Recess between Senate sessions. *Noel Canning, etc., v. NLRB, et al.*, 705 F.3d 490, 507-08 (D.C. Cir. 2013) (*cert. granted*, 2013 U.S. LEXIS 4876 (U.S., June 24, 2013). The Court correctly pointed to the significant distinction of the Framers' use of "the Recess," rather than "a recess." "Then, as now, the word 'the' was and is a definite article...'noting a particular thing.'" *Id.* at 500-01, 503. "As a matter of cold,

unadorned logic, it makes no sense to adopt the Board's proposition that when the Framers said 'the Recess,' what they really meant was 'a recess.'" *Id.* at 500. The use of a definite article limits the validity of temporary appointments or *Commissions* to a specific type of recess that follows each Senate session. The Court's interpretation is correct, as well as consistent with the Framers' intent.

Alexander Hamilton wrote that the intent of the recess appointment power was "to be nothing more than a supplement for the other, for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate." The Federalist No. 67 (A. Hamilton). It is evident the supplemental power was a practical approach to responding to vacancies that arise during the Senate's recess in between sessions. In the words of the U.S. Court of Appeals of the Third Circuit, the purpose for supplementing the appointment clause with the recess-appointment clause is "to preserve the Senate's advice-and-consent power by limiting the president's unilateral appointment power," not to expand it. *NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203, 229 (3d Cir. 2013).

The President's purported Recess appointments to the NLRB were not made during any Senate recess, and certainly not during a recess between sessions. The Senate ended its first session of the 112th Congress on December 30, 2011 and began the second session on January 3, 2012. 157 Cong. Rec. S8783-8784 (Dec. 17, 2011) (Sen. Wyden). Even if the Senate were considered to be in recess, the

President's temporary appointments were made on January 4, 2012, after the Senate began the new session. *Id.* The political agenda that is evident by the President's statement "I will not take no for an answer," led to unconstitutional appointments without the Senate's advice and consent when the Senate was not in Recess. 2012 Daily Comp. Pres. Docs. No. 00003, 3 (Jan. 4, 2012). This type of party politics is not new, as was observed by the Court in *Freytag v. Commissioner,* and therefore commands constitutional accountability to preserve the limitations placed on the President. 501 U.S. at 883-884.

II. THE SENATE DETERMINES ITS OWN RULES AND PROCEDURES.

The President's supposed Recess appointments are unconstitutional because the Senate was in session at the time they were made. Section 5 of Article I empowers each House of Congress to determine the rules of its proceedings. U.S. CONST., Article I, §5, Clause 2.

> The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the

> rule to say that some other way would be better, more accurate or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."

United States v. Ballin, 144 U.S. 1, 4-5 (1892).

On December 17, 2011, the Senate decided unanimously to convene every three days from December 17, 2011 to January 20, 2012, including on, but not limited to, January 3, 2012 and January 6, 2012. 157 Cong. Rec. at S8783-84. That same day, the Senate also unanimously agreed to conclude the first session of the 112th Congress on December 30, 2011 and start its second session on January 3, 2012. *Id.* All of these decisions and actions taken by the Senate in its December 17, 2011 Order were within its discretion and authority to make under the power delegated to it by Article I of the Constitution.

The President's declaration that these sessions were invalid disregards the Senate's authority to determine and administer its own procedures, including when it will recess and how it will conduct its business. Furthermore, it threatens the fundamental principle of separation of powers embedded in Constitution. The President's position that the

Senate cannot decide for itself when a Recess takes places is a dangerous supposition that the Executive Branch may interfere with or determine what business suffices for the Senate to be in session. For example, during one session, on December 23, 2011, the Senate passed and the President signed a two month extension of the reduced payroll tax, unemployment insurance, TANF and the Medicare payment fix. 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011). Additionally, the session held on January 3, 2012 constituted the meeting required by the Twentieth Amendment. U.S. Const., amend. XX, §2. The Constitution does not afford the authority to the Executive Branch to determine what type of business is sufficient to declare the Senate in recess or how it should conduct its business. Only the Senate can declare itself in session and when or whether it will recess by its delegated powers. Therefore, as the Senate declined to recess and convene through January 20, 2012, the so-called Recess appointments are invalid.

III. THE INCONSISTENT APPLICATION OF RECESS APPOINTMENTS IS IRRELEVANT TO THE INTERPRETATION OF THE RECESS APPOINTMENT CLAUSE.

Petitioner, NLRB, relies in part on appointments by previous executives during intra-session recesses to support its argument that they are constitutional. However, the Board cannot deny the dilemma presented by the inconsistent interpretations of prior Presidents, nor can it deny the lack of such temporary appointments for at the least the first eighty

(80) years following the Constitution's ratification. *Brief for the Petitioner*, 21. At best, the Board may argue that the intra-session appointments were more predominately made in modern history.

While the historical application of Recess appointments is irrelevant because the text is clear, a brief summary of the inconsistent application is evidence of how prior appointments on political whim have created confusion and uncertainty. For almost 100 years following the Constitution's ratification, Presidents conformed to the constitutional text and did not make intra-session appointments. *Id.* While Petitioner points to some intra-session appointments made in 1867 and 1868, it could not deny that the President took the opposite view in 1901 when Attorney General Knox concluded that the Recess Appointment Clause did not include intra-session recesses. Again in 1921, the view of the President changed to permit intra-session recess appointments, but only when the Senate adjourned for more than three days. *Id.* at 21-24. In fact, the President had taken the same position when then Solicitor Elena Kagan's letter was filed with the Supreme Court on behalf of Respondent in *New Process Steel, L.P. v. NLRB* stating that "the Senate may act to foreclose the [recess appointment] option by declining to recess" and convening pro forma sessions every three days. *See Respondent's Letter Br., New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (No. 08-1457). Yet now, the President has taken an even more extreme position in sharp contrast to his earlier 2010 view that recess appoint-

ments are permissible while the Senate convenes every three days.

The constitutional interpretation of the validity of Recess appointments cannot be based on the inconsistent past intra-session appointments politically motivated by one side of the aisle or another. The Framers recognized the risk of political manipulation:

> [M]anipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, see G. Wood, The Creation of The American Republic 1776-1787, p. 79 (1969) (Wood), because 'the power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism.' *Id.*, at 143. Those who framed our Constitution addressed these concerns by carefully husbanding the appointment power to limit its diffusion. Although the debate on the Appointments Clause was brief, the sparse record indicates the Framers' determination to limit the distribution of the power of appointment. ...The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people.

Freytag, 501 U.S. at 883-884. Consistent with the Framers' intent and the Court's statement above, Recess appointments must conform to the constitutional limitations in order to preserve the structural principles secured by the separation of powers. The alternative is the same unpredictability and inconsistent application and susceptibility to political maneuvering and manipulation.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court affirm the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Paul J. Orfanedes
Counsel of Record
Ramona R. Cotca
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
(202) 646-5172
porfanedes@judicialwatch.org

Counsel for Amici Curiae

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AMICUS CURIAE BRIEF

RECORD
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No. 12-1281

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In The
Supreme Court of the United States

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Petitioner,

v.

NOEL CANNING,
A DIVISION OF THE NOEL CORP., ET AL.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

MARK R. LEVIN
MICHAEL J. O'NEILL
MATTHEW C. FORYS
LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176
(703) 554-6100
(703) 554-6119 (Facsimile)

RICHARD P. HUTCHISON
Counsel of Record
LANDMARK LEGAL FOUNDATION
3100 Broadway
Suite 1210
Kansas City, MO 64111
(816) 931-1175
(816) 931-1115 (Facsimile)
rpetehutch@aol.com

Attorneys for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, Landmark Legal Foundation, is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in Constitutional history and litigation, Landmark presents herein a unique perspective concerning the legal issues and national implications of the D.C. Circuit's opinion.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about whether the Executive Branch can evade the Constitution's clear design for a shared appointment power of federal officers and judges by reading the exception to the power so broadly that the Senate's role is effectively nullified. *Amicus Curiae*, Landmark Legal Foundation, respectfully requests this Court to uphold the decision of the D.C. Circuit Court in full.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The purported recess appointments to the National Labor Relations Board ("NLRB") at issue in this case are constitutionally invalid because they did not occur during an intersession recess of the Senate and the vacancies they filled had not arisen during an intersession recess of the Senate. An *intersession* recess is the break between sessions of Congress, whereas an *intrasession* recess is a temporary break or adjournment within the session. The end of the Senate's legislative session is normally marked by a specific adjournment – an adjournment *sine die*. *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 218-219 (3d Cir. 2013). "An intersession break is the period between an adjournment *sine die* and the start of the next session." Id. By contrast, "An intrasession break is demarked by a Senate adjournment of any type – other than adjournment *sine die* – and lasts until the next time the Senate convenes, which is set by the motion to adjourn." Id. at 219.

The Constitution created a shared system of the appointment power between the Senate and the President in Article II of the Constitution: the Appointments Clause.[2] Under this Clause, the President

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[2] [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper,

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may nominate individuals for certain positions within the Executive and Judicial Branches, subject to Senatorial appointment. An exception to this system of shared power immediately follows: The Recess Appointments Clause. The Recess Appointments Clause states, "The President shall have power to fill *vacancies that may happen during the Recess* of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3 (emphasis added).

The Executive Branch claims that the words of the Recess Appointments Clause are pliable and create a broad power for the executive. The Executive Branch does so primarily in reliance on the select opinions of past Attorneys General – the Presidents' own lawyers. Accordingly, there are two fundamental questions at hand. First, what does "the Recess" mean? Does it mean solely the Recess between sessions of Congress or does it apply more broadly to the frequent and often shorter periods of adjournment within sessions? Second, what does "happen" mean in the context of vacancies? Does it mean only those vacancies that arose during the Recess or does it apply more broadly to vacancies that occurred at some point during the prior legislative session and that continue to exist in the Recess? The answers to these questions are not found in the self-interested

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in the President alone, in the Courts of Law, or in the Heads of Departments. U.S. Const. art. II, § 2, cl. 2.

opinions of the Executive Branch, but in an analysis of the Constitution itself.

ARGUMENT

An examination of the text of the Recess Appointments Clause, its relation to other provisions within the Constitution, its historical context, purpose, and practical experience all lead to the conclusion that the Clause refers only to intersession recesses and only to vacancies arising during intersession recesses. To read "the Recess" or "happen during the Recess" as broadly as suggested by the Executive Branch provides no principled limits to the President's appointment power, allowing him to make appointments for longstanding vacancies whenever the Senate adjourns for lunch. See *NRLB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 230 (3d Cir. 2013). The Government's arguments to this Court thus would make the Appointments Clause a virtual nullity, tearing down the bulwark that "preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 878 (1991).

I. Recess Appointments Are Only Constitutionally Permissible During Intersession Recesses Of Congress.

A. The Meaning of "the Recess," As Demonstrated by Pre-Ratification Sources, Supports a Limited Interpretation.

As Judge Thomas M. Cooley wrote, "the meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 54 (1868). The meaning of the Clause, and specifically its terms "the recess" and "happen," should thus be examined for how they were commonly understood at the time of the Constitution's ratification. Using the modern understanding of words to interpret a document written over two hundred years ago often leads the analysis astray. For example, reading the phrase "natural born Citizen" in Article II, Section 1, Clause 5, using only current usage could lead to the absurd conclusion that prospective presidents must be born to mothers who did not use anesthesia during childbirth. Edward Whelan, *Are You An Originalist?*, National Review Online (July 13, 2005), available at http://www.eppc.org/publications/are-you-an-originalist/.

Dictionaries from the period before the Constitution's ratification provide numerous definitions for the word "recess." Samuel Johnson's lists retirement,

retreat, withdrawing, recession; departure; place of retirement, place of secrecy, private abode; departure into privacy; remission or suspension of any procedure; and removal to distance.[3] Admittedly, these definitions do not all indicate a formal suspension of procedure, as distinct from an informal or temporary one. In legislative practice in the pre-ratification era, furthermore, the word "recess" by itself was used to describe intrasession breaks and even short breaks within a single day. Robert G. Natelson, *The Origins and Meaning of "Vacancies that may happen during the Recess" in the Constitution's Recess Appointments Clause*, p. 20 (forthcoming publication at Harvard Journal of Law and Public Policy, Vol. 37, No. 1 (2014)), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257801.

The inquiry does not stop there, however. Numerous sources indicate a distinct meaning in the pre-ratification era when "the recess" as opposed to "recess" alone was used. Blackstone's Commentaries from 1765-1769 uses the term "the recess" and does

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[3] Johnson provides: "1. Retirement; retreat; withdrawing; recession. 2. Departure. 3. Place of retirement; place of secrecy; private abode. 4. [Recez, Fr.] Perhaps an abstract of the proceedings of an imperial diet. 5. Departure into privacy. 6. Remission or suspension of any procedure. 7. Removal to distance. 8. Privacy; secrecy of abode. 9. Secret part." Samuel Johnson, 2 *A Dictionary of the English Language* 469 (6th ed. 1785). Another contemporaneous dictionary defines "Recess and Recession" as "retreating or withdrawing; a Place of Retreat or Retirement." Nathan Bailey, *An Universal Etymological English Dictionary* (20th ed. 1763).

so in a way to describe the period *between* sessions of Parliament. For example, within discussions of "Public Wrongs," he writes of "the recess" of parliament as distinct from "the session" of parliament.

> During the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward, but before the court last-mentioned, of our lord the king in parliament. . . . But in the court of the lord high steward, which is held in *the recess* of parliament, he is the sole judge in matters of law. . . . William Blackstone, 4 *Commentaries on the Laws of England* (1st ed. 1765) at 260.

Moreover, it is critical to note that the Constitution uses the term "the Recess" when examining the text. The Constitution does not state that the recess appointment power exists "during a Recess" or "during Recesses." The notion that the definite article limits the scope of applicable recesses is supported by Professor Robert G. Natelson, who after exhaustive research of the pre-ratification era determined that "in government practice the phrase 'the Recess' *always* referred to the gap between sessions." Natelson, *supra*, at 20. State legislative journals, gubernatorial reports and other documents show that "the Recess" was used frequently to refer exclusively to periods of time between legislative sessions and not while the legislature was currently in session – in other words, intersession recesses as opposed to intrasession recesses. Id.

New Hampshire's Constitution of 1784, which referred to the executive branch as the "President" and the legislative branch as the "General Court," gave the executive different powers at different times – during "the recess" of the legislature and during the "session" of the legislature:

> The President, with the advice of Council shall have full power and authority in *the recess* of the General-Court, to prorogue the same from time to time, not exceeding ninety days in any one recess of said Court; and during the session of said Court, to adjourn or prorogue it to any time the two houses may desire and to call it together sooner than the time to which it may be adjourned or prorogued. . . . N.H. Const., Part Second, Art. 50 (1784) (emphasis added).

The Massachusetts Constitution of 1780 also gave the state governor different powers depending on whether the legislature was in "session" or in "recess." Mass. Const. of 1780, Pt. 2, Ch. 2, Sec. 1, Art. 5.

New Hampshire's legislative journals show that the state followed this practice of using the term "the recess" to indicate periods when the legislature was not in session. Natelson, at 24. In Virginia, state legislators were once ordered to "consult with their constituents, during the recess of Assembly, on the justice and expediency of passing the bill . . . and that they procure from them instructions, whether or not the said bill shall be passed, and lay the same before the House of Delegates at their next session." Journal

of the House of Delegates of the Commonwealth of Virginia (1777-1781) (Thomas W. White, 1827) 123 (Dec. 18, 1778). New York's legislative journal from 1766 to 1776 includes frequent references to "the recess of this house" or "the recess of the house" that unequivocally refer to periods when the legislature was not in session.[4] The legislatures of Massachusetts and Rhode Island also used "the recess" in this way. See Natelson, at 23-24.

There are many more examples in the states where "the recess" was not so explicitly referring to the gap between sessions, but can be inferred easily from context. State legislatures frequently created committees or delegated power to the executive branch to act during the recess, suggesting at the very least a substantial period of time was contemplated. The legislatures of Connecticut, Delaware, Georgia, Massachusetts, New Jersey, New York,

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[4] E.g., "Resolved, . . . That the consideration of the prayer of the petition of Ryer Schermerhorn and others, for a bill to appoint commissioners to settle the said controversy . . . be postponed till the next sessions. And that this house recommends to the parties to agree among themselves, during the recess thereof, on amicable terms for settling the said controversy." January 29, 1773. Journal of the Votes and Proceedings of the General Assembly of the Colony of New-York (1820) 38; and "Ordered, That the said bill be postponed till the next session; and that the clerk of this house do, in the recess thereof, (on application to him made) furnish the parties . . . with certified copies of the said bill. . . ." March 7, 1773. Journal of the Votes and Proceedings of the General Assembly of the Colony of New-York (1820) 83.

North Carolina, Pennsylvania, Rhode Island and South Carolina all provide examples of such delegations of power. Natelson, at 25-28. In fact, some states customarily passed an omnibus bill near the end of the session that listed the various powers delegated to the state's executive branch in "the recess" or "until the next Setting." Id. at 28 (citing 19 *The Acts and Resolves, Public and Private, of the Province of Massachusetts Bay* (Boston: Wright and Potter Printing Co. 1918) at 720-21 and at 812).

The legislature's delegation of power to act during the recess may also be found in The Articles of Confederation of 1781:

> The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated 'A Committee of the States', and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction. Arts. Confed. art. IX.[5]

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[5] The powers of the Committee of the States were further provided for in Article X: "The Committee of the States, or any nine of them, shall be authorized to execute, *in the recess of Congress*, such of the powers of Congress as the United States in Congress assembled, by the consent of the nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of

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The Executive Branch argues that the only time the Congress invoked this power was during an intrasession recess in 1784. Petitioner's Brief, p. 15. That is not correct. According to Natelson, "The intermission actually lasted from June 3, 1784 to the first Monday in November (that is, November 1, 1784), the date designated by the Articles of Confederation for the beginning of the next term of office. Thus it was necessarily an inter-session recess." Natelson, at 30.

The Executive Branch, in the Court below, has also pointed to an instance post-ratification in which the Senate sat a New Jersey Senator supposedly appointed during an intrasession break, despite this Clause likewise being limited to "the Recess." See 8 Annals of Cong. 2197 (Dec. 19, 1798). State legislatures at that time, however, had multiple "sittings" throughout the year. So while they did not adjourn *sine die* between each, they took intersession recess repeatedly. Again, the Executive Branch's example thus is mistaken, as the New Jersey Legislature had multiple "sittings" throughout the year and took "the recess" between each of those "sittings," enabling this appointment. See New Jersey Legis. Counsel Journal, 23rd Sess., 1st Sitting 1, 20 (1798); New Jersey Legis. Counsel Journal, 23rd Sess., 2d Sitting 21 (1799). Nevertheless, even if it is assumed that the Executive Branch can point to individual instances of

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nine States in the Congress of the United States assembled be requisite." Id. (emphasis added).

intrasession recess appointments among thirteen states with varying degrees of effective record-keeping, it does not disprove the larger point. The breadth of usage of "the recess" to mean intersession recesses throughout the United States in the ratification era strongly supports that it was a common understanding of the term.

B. A Textual Analysis of the Clause and its Relation to Other Parts of the Constitution Indicates That "the Recess" Means Intersession Recess.

A textual analysis of the Recess Appointments Clause indicates that it applies only to intersession recesses. First, as noted earlier, the singular term "Recess," as opposed to "Recesses," suggests the Framers intended limiting the use of recess appointments for the intersession recess only. The Framers understood that Congress would enter recesses during sessions as evinced by Article I's language pertaining to instances where one "House of Congress adjourns 'during the Session of Congress.'" Michael A. Carrier, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?* 92 Mich. L. Rev. 2204, 2211 (1994). These recesses, however, were comparatively brief and rare. Id. at note 36 (citing U.S. Gov't Printing Office, 1993-1994 Official Directory, 103d Congress at 580-81 (1993)). The Framers did not use the plural "Recesses" which would have any clearly and without question granted the power during any and all recesses. Instead, they used the

singular "Recess" because they were referring to the break between sessions of Congress.

Second, the Recess Appointments Clause's use of the definite article "the" demonstrates that the Framers intended limiting this power to intersession recesses, under the textual canon of the rule against surplusage. There was a reason why the Framers chose "the" instead of "a" or "any." The use of the definite article before Recess thus indicates that the Framers were creating a limitation on which recesses were contemplated. See *Freytag*, 501 U.S. at 902 (Scalia, J., concurring) (arguing that the use of the definite article in the conferral of authority in Appointments Clause to "the Courts of Law" "obviously narrows the class of eligible 'Courts of Law' to those courts of law envisioned by the Constitution.").

This interpretation of "the Recess" was adopted by President Theodore Roosevelt's Attorney General, Philander C. Knox, on the propriety of appointing an appraiser to the port of New York during the December 1901 holiday adjournment. Knox noted, "It will be observed that the phrase is 'the recess.'" 23 Op. Att'y Gen. 599, 1901 U.S. AG LEXIS 1, at *3. At the time, intrasession recesses were rare. Knox, in distinguishing the terms, noted that "adjournment" "means a merely temporary suspension of business from day to day" where "the recess means the period after the final adjournment of Congress for the session, and before the next session begins." Id. at *5. He concluded, "[T]his period following the final adjournment for the session which is the recess during which the

President has power to fill vacancies by granting commissions which shall expire at the end of the next session." Id. at *6. Thus, "any intermediate temporary adjournment is not such recess, although it may be a recess in the general and ordinary use of that term." Id.

Finally, the Constitution's use of the terms "recess" and "adjournment" suggests the Framers intended the term "recess" to mean intersession recess. Returning to textual canons, it is presumed that the use of different words demonstrates the intent to convey different meanings. Appearing in five clauses in the Constitution, the term "adjournment" refers to both intersession and intrasession recesses. For example, the reference to "adjournment" in the presentment clause refers to all recesses as both types could interfere with "the President's constitutional right to take 10 days to return a bill to the Congress." Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1558 (2005). Article I, Section 5's language referencing the "Three Day Adjournment" refers to intrasession recesses and can also be applied to intersession breaks. "If a proposed adjournment were to end the session and bring about an intersession recess, that would presumably also be covered by the Clause, as an adjournment 'during the session . . . for more than three days.'" Id.

The usage of the term "recess" within the constitution does not apply to both adjournments and

recesses. "Adjournment" applies to both intersession and intrasession recesses. Unlike the meaning of "adjournment," recess does not necessarily encompass intrasession and intersession breaks. This indicates the Framers believed recess to apply in a more narrow context. Id. at 1559-60.

C. The Purpose of the Recess Appointments Clause Supports a Narrow Reading of "the Recess."

The purpose of the Recess Appointments Clause is best understood not only in conjunction with the Appointments Clause but as part of the overall system of separation of powers in the Constitution. In this way, it supports a limited sense of "the Recess" to intersession breaks so that the integrity of the Appointments Clause is preserved.

The Appointments Clause confers appointment power upon the President and the Senate. U.S. Const. art. II, § 2, cl. 2. Envisioned as a joint power, the Framers believed it would be dangerous to vest complete appointment power with one person. Even Alexander Hamilton, a proponent of strong presidential authority, acknowledged the benefits of obligating the consent of the Senate: "[the cooperation of the Senate] would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice." Hamilton, *The Federalist* No. 76. In his opinion, giving the Senate a role in making

appointments "would be an efficacious source of stability in the administration." Id. Thus, the Executive and Legislative Branches have a specific role in filling the ranks of executive officers and judges. The division of the appointments power "accomplished two goals: responsibility – from the President's power of nomination; stability – from the Senate's power of confirmation." Carrier, 92 Mich. L. Rev. at 2225.

Furthermore, the need for an exception to the Appointments Clause was evident in an era of very long intersession recesses. The Framers understood that it would be improper to obligate the Senate to be in continual session. As intersession recesses sometimes lasted as long as nine months, the Framers drafted the Recess Appointments Clause to ensure vacancies would not result in crucial offices being left empty. Rappaport, 52 UCLA L. Rev. at 1491; *Mackie v. Clinton*, 827 F. Supp. 56, 58 (D.D.C. 1993) ("It is apparent that the purpose of the Recess Appointments Clause was to prevent disruptions in the functioning of the government occasioned by periods in which the Senate is unable to perform its role of advice and consent.") Indeed, the purpose of the Recess Appointments Clause was not to grant the President a tool to evade the confirmation process. Rather, the power ensured that critical offices would not be left vacant during the long intersession recesses regularly occurring during the Framer's era. Moreover, the Framers intended the recess appointments power "to be nothing more than a supplement to the other, for the purpose of establishing an

auxiliary method of appointment, in cases to which the general method was inadequate." Hamilton, *The Federalist* No. 67.

Commentators contrast the extensive debates surrounding the general appointment power with the lack of debate regarding the recess appointments power and have logically concluded the recess appointments power to be "auxiliary in nature and that [the Framers] believed it would not affect the Constitution's meticulously developed system of checks and balances." Carrier, 92 Mich. L. Rev. at 2225. If the Framers had intended an expansive reading of the term recess, they would have engaged in more extensive debate concerning the issue. Id. ("[To give the President this power] seems unlikely in light of the minimal impact the Framers intended the clause to have on the system of checks and balances.")

Moreover, permitting intrasession recess appointments can result in appointments for exceptionally extended periods, possibly twice as long as intersession recess appointments, based on Article II's language that recess appointments "shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. Such a reading undermines the checks and balances built into the process because it provides incentives for the President to bypass the Senate whenever possible.

In summary, by the Recess Appointments Clause's own words, its history, purpose and context within the Constitution, the President may only make

appointments during *intersession* and not *intrasession* recesses.

II. Recess Appointments Are Only Constitutionally Permissible For Vacancies That "Happen" During the Recess of the Senate.

The recess appointments at issue in this case are also invalid because the NLRB vacancies the President attempted to fill in January 2012 did not "happen" during a Senate recess. Accordingly, those preexisting vacancies could not be filled via recess appointments. The Constitution allows the limited recess appointments power to be used only when the vacancy actually "happens" or arises during a recess, not whenever a vacancy "happens to exist" during a recess. Once again, the Government has advocated a broader meaning of words to support broader executive power.

A. The Meaning of "Happen," As Demonstrated by Pre-Ratification Sources, Supports a Limited Interpretation of "Vacancies That Happen During the Recess of the Senate."

Returning to the dictionaries from the period before the Constitution's ratification, they overwhelmingly establish that "happen" signifies a sense of "arise" rather than "happen to exist." Samuel Johnson provides "1. To fall out; to chance; to come to

pass. 2. To light; to fall by chance." Samuel Johnson, 1 *A Dictionary of the English Language* 929 (6th ed. 1785). Numerous other dictionaries provide similar phrases that suggest a discrete event, as opposed to an ongoing event or condition. In fact, Professor Natelson conducted a survey of nearly a dozen pre-ratification era dictionaries that produced only a single example of "to be" and that was a secondary definition after "to come to pass." Natelson, at 37-38. In short, the suggestion that "happen" in the Recess Appointments Clause would have been commonly understood to mean "happen to exist" during the ratification era is clearly false.

B. A Textual Analysis of the Clause and its Relation to Other Parts of the Constitution Suggest a Limited Meaning to "Happen During the Recess."

Returning again to the text, the Recess Appointments Clause states: "[t]he President shall have Power to fill up all *Vacancies that may happen during the Recess of the Senate*, by granting Commissions which shall expire at the End of their next Session." U.S. Const., art. II, § 2, cl. 3 (emphasis added). The clause does not say that the President may fill all "vacancies that may happen to exist" whenever a Senate recess occurs. The Constitution's plain text states that a vacancy can only be filled by a recess appointment if the vacancy actually occurred "during the Recess of the Senate," such as through death or

resignation of an officeholder. The NLRB vacancies President Obama attempted to fill arose months or longer before the purported Senate recess. As they did not "happen" during any recess, the appointments are unlawful.

As in other cases, "[t]he words used in the Constitution are to be taken in their natural and obvious sense, and are to be given the meaning they have in common use unless there are very strong reasons to the contrary." *The Pocket Veto Case*, 279 U.S. 655, 679 (1929), citing *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), and *Tennessee v. Whitworth*, 117 U.S. 139, 147 (1886). The words in the Constitution are clear: only "Vacancies that may happen during the Recess" can be filled without the Senate's advice and consent. The words do not contemplate the filling of vacancies "that may happen to exist" during a recess.

To read "happen" to mean "happen to exist" violates the textual canon of the rule against surplusage. It creates a redundancy for no purpose. The Framers could have written: "The President shall have Power to fill up all Vacancies during the Recess of the Senate . . . " or "The President shall have Power, during the Recess of the Senate, to fill up all Vacancies . . . " To add "happen" to mean "happen to exist" only creates ambiguity.

C. The Purpose of the Recess Appointments Clause Supports a Narrow Reading of "Happen During the Recess."

As stated earlier, the purpose of the Recess Appointments Clause is best understood not only in conjunction with the Appointments Clause but as part of the overall system of separation of powers in the Constitution. In this way, it supports a limited sense of "happen" to mean only those vacancies that arise during the Recess so that the integrity of the Appointments Clause is preserved. Indeed, an interpretation of the Recess Appointments Clause that allows the filling of any "Vacancies that may happen to exist" defeats our constitutional system of checks and balances and negates the joint power of appointment vested in the Executive and Legislative Branches. A "happen to exist" interpretation allows a President to wait for an inevitable recess, and then unilaterally appoint nominees seriatim, thereby permanently writing the Senate out of the confirmation process. This is something the Framers surely opposed. See generally *Bowsher v. Synar*, 478 U.S. 714, 721-27 (1986) (discussing importance of separation of powers and checks and balances). Precisely because the Framers wanted to diffuse governmental power and ensure the Senate's check on the President's appointments power, they did not grant the President the broad power to fill any vacancies that "may happen to exist" during a recess.

The constitutional text outlines only two limited circumstances when federal appointments can be made without the Senate's advice and consent: 1) Congress may authorize the appointment of inferior officers by other governmental branches; and 2) the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3. Precisely because these are exceptions to the normal joint power of appointment preferred by the Founders, they must be narrowly construed. Rappaport, 52 UCLA L. Rev. at 1501-46.

The nation's first Attorney General, Edmund Randolph, authored an opinion denying the President's authority to fill vacancies that arose during a Senate session and continued into its subsequent recess. See Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), in 24 *The Papers of Thomas Jefferson*, 165-67 (John Catanzariti et al. ed., 1990) (explaining that the Recess Appointments Clause must be "interpreted strictly" because it serves as "an exception to the general participation of the Senate"). Furthermore, Randolph concluded that the power must "be considered as an exception to the general participation of the Senate" because the "[s]pirit of the Constitution favors the participation of the Senate in all appointments." Id. Alexander Hamilton likewise believed "[i]t is clear [that] . . . the President cannot fill a vacancy which happens during a session of the Senate." Letter from Alexander Hamilton to James McHenry (May 3, 1799), 23 *The Papers of Alexander Hamilton* 94 (Harold C. Syrett ed., 1976). See also *The Federalist* No. 67 (Alexander

Hamilton) ("vacancies might happen in their recess, which it might be necessary for the public service to fill without delay.")

III. The Exercise of the Recess Appointments Clause Shows The Inevitable Problems When the Text of the Constitution is Abandoned.

In the years immediately following the Constitution's ratification, the limited sense of both terms, "the Recess" and "happen" largely prevailed. Similar to the state practice of state governors in the pre-ratification era, President George Washington's annual messages to Congress included references to "your recess" twice and "the recess of Congress," suggesting their distinction from temporary breaks.[6]

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[6] In 1791, he wrote, "In the interval of *your recess* due attention has been paid to the execution of the different objects which were specially provided for by the laws and resolutions of the last session." Third Annual Message of George Washington, October 25, 1791 (emphasis added), available at http://avalon.law.yale.edu/18th_century/washs03.asp. In 1793, he wrote, "An anxiety has been also demonstrated by the Executive for peace with the Creeks and the Cherokees. The former have been relieved with corn and with clothing, and offensive measures against them prohibited during *the recess of Congress*." Fifth Annual Message of George Washington, December 3, 1793 (emphasis added), available at http://avalon.law.yale.edu/18th_century/washs05.asp. (Congress' prior session had ended March 4, 1793 and had only resumed on December 2, 1793.) Finally, in 1794, he wrote, "When we call to mind the gracious indulgence of Heaven by which the American people became a nation; . . . with the deepest regret do I announce to you that during *your*

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Washington also developed a practice to address late session vacancies whereby he would nominate someone without knowing if they would consent, and seek their appointment by the Senate. If they later declined the appointment, this created a vacancy during the recess, allowing him to make a proper recess appointment. 52 UCLA L. Rev. at 1522-23. This suggests he agreed with the limited sense of "happen," as in "happen to arise." As shown earlier, President Washington's Attorney General advocated for the limited, not broad, reading of the Clause as well.

In fact, for most of the nation's history, recess appointments were generally limited to intersession recesses. Carrier, *supra*, at 2210. During the first 150 years of this nation's history, there are only two documented cases of a President making an intrasession recess appointment. Id. at 2209. Prior to 1901, the only intrasession recess appointments were during President Andrew Johnson's term – an administration that issued no written opinions arguing for the constitutionality of intrasession recess appointments. Rappaport, 52 UCLA L. Rev. at 1572.

Unfortunately, however, the seeds were planted for a purposive, in contrast to a textual, interpretation of the Clause by President James Monroe's

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recess some of the citizens of the United States have been found capable of insurrection." Sixth Annual Message of George Washington, November 19, 1794 (emphasis added), available at http://avalon.law.yale.edu/18th_century/washs06.asp.

Attorney General William Wirt. Wirt was the first major proponent of the "happen" as "happen to exist" argument. Wirt pointed to situations where he believed the President's Recess Appointments powers are unnecessarily constrained – as when a late session vacancy arises or when the Legislature might recess abruptly – such as after invasion. He argued that "the substantial purpose of the constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed." 1 Op. Att'y Gen. 631, 632 (1823). Of course, Wirt only focused on one purpose of the Appointments Power. Wirt assumed the filling of vacancies was paramount, and ignored the other purposes as outlined by Hamilton in the Federalist Papers – to ensure that those with "unfit character" were not appointed to the government and to promote the government's "stability."

The purposive approach to the Recess Appointments Clause, thus, is an excuse to ignore its terms and the compromise between the Legislative and Executive Branch inherent in the Appointments Clause. See *Federal Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) (per Burger, C.J.) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise."). The purposive interpretation of the Recess Appointments Clause, furthermore, has created a steady erosion of the separation of powers principle undergirding it at the expense of the Senate.

President Harding's Attorney General, Harry M. Daugherty, adopted Wirt's expansive approach in 1921, this time to the meaning of recess, and parsed the purpose of the clause to his ends as the President's lawyer. Daugherty advocated for a practical approach. He argued that "the broad and underlying purpose of the Constitution is to prohibit the President from making appointments without the advice and consent of the Senate whenever that body is in session so that its advice and consent can be obtained." 33 Op. Att'y Gen. 20, 21 (1921). To Daugherty, therefore, it did not matter whether the Senate was adjourned or in recess. "[T]he real question . . . is whether in a practical sense the Senate is in session so that its advice and consent can be obtained. To give the word 'recess' a technical and not a practical construction is to disregard substance for form." Id. at 21-22.

There is substance behind the form of the Recess Appointments Clause, however. It was designed to be an exception to a larger system requiring cooperation among branches in appointments, as discussed earlier. To allow the President to decide for himself when practice suited him is to ignore that substance. Another inherent problem with Daugherty's argument, moreover, is its failure to provide any principled minimum time limit to the Senate's absence. Daugherty feebly attempted to argue that "no one, I venture to say, would for a moment contend that the Senate is not in session when an adjournment of [three days] is taken" but that, as practice has since shown, was

false bluster. Id. at 25. As he admits, "In the very nature of things the line of demarcation can not (sic) be accurately drawn." Id. Once the lines of demarcation created by the Constitution are abandoned, as we have seen, it is difficult to redraw them convincingly. For example, some have attempted to set the minimum adjournment time by the three days of the Adjournments Clause, despite the fact that "[n]othing in the text of either Clause, the Constitution's structure, or its history suggests a link between the Clauses." *Noel Canning v. NLRB*, 705 F.3d 490, 504 (D.C. Cir. 2013).

Proponents of expanded executive power have also pointed to an opinion from a purported legislative source that acquiesces to the interpretation of the President's Attorney General at the Senate's expense. 28 Comp. Gen. 30, B-77963, 1948 WL 512 (Comp. Gen.). The Executive Branch cites the Comptroller General as a "legislative officer" who adopted the Daugherty opinion as "the accepted view" of the Recess Appointments Clause. Petitioners Brief at 26. It should be noted, however, that Comptroller General Warren, the issuer of the opinion, had been appointed by a Democratic President, Franklin Roosevelt, and the position he took in the opinion generally supported the recess appointments of Democratic President Harry Truman, who had bitter relations with a Republican-controlled Senate.

The Government's reliance on the Comptroller General, past Attorneys General and the Department of Justice's Office of Legal Counsel raises several

issues. First, the Executive Branch cites the weight of administrative and not judicial opinion. This body of administrative opinion is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), nor is it particularly persuasive. The President's lawyers (and appointees) are likely to adopt an expansive, rather than narrow, interpretation of executive power. As Justice Scalia wrote in the context of an Attorney General's opinion of a criminal statute:

> Any responsible lawyer advising on whether particular conduct violates a criminal statute will obviously err in the direction of inclusion rather than exclusion – assuming, to be on the safe side, that the statute may cover more than is entirely apparent. That tendency is reinforced when the advice-giver is the Justice Department, which knows that if it takes an erroneously narrow view of what it can prosecute the error will likely never be corrected, whereas an erroneously broad view will be corrected by the courts when prosecutions are brought. *Crandon v. United States*, 494 U.S. 152, 177-178 (1990) (Scalia, J., concurring).

Unfortunately, however, the courts have only recently begun to correct the erroneously broad view of the Recess Appointments Clause. This lack of judicial opinion is due in part to the lack of legal challenges to recess appointments. This is certainly understandable, given the potential roadblocks preventing cases from ever coming to the bar: standing,

political question, the natural reluctance to ask a judge to invalidate the opinions of a sitting judge. After reviewing the Executive Branch's appendix of purported intrasession appointments, one might ask, who would have had standing to challenge the appointment of the Secretary of Legation to Prussia in 1867? Petitioner's Brief at 2a. Which American citizen would have wanted to challenge Dwight D. Eisenhower's promotion to Major General in 1943? Id. at 11a. Furthermore, how often would a lawyer representing an aggrieved client suggest they ask a judge to overturn the appointment of a fellow judge? The case at bar highlights the unusual facts necessary to a clearly justiciable controversy – an entire quorum of an administrative board was appointed under dubious circumstances. It is no wonder that there has been such a paucity of judicial opinion on the issue of recess appointments. The Executive Branch's long record of erroneous practice should thus have little bearing on the Court's analysis of the constitutional issues at hand.

Certainly, the Senate has had powers to push back against dubious recess appointments, but history has shown that the institution has had a shifting perspective that seems to arise with changes in partisan affiliation. Furthermore, any attempt by the Senate to counter improper recess appointments by legislation would require cooperation from the House and the President himself for enactment.

Against this backdrop, the Executive Branch has made a significant number of appointments during

shorter and shorter intrasession recesses. "Frequent presidential use of the recess appointment power during intra-session recesses began in 1947." Carrier, 92 Mich. L. Rev. at 2212. President Eisenhower made "nine intra-session recess appointments, during recesses as short as thirty-five days." Id. at 2213. Subsequent presidents "have used, with increasing frequency, the recess appointments power during intra-session recesses of decreasing length." Id. at 2216.

The Executive Branch has now taken the extreme position of making a recess appointment while the Senate was in *pro forma* session. The instant case is the inevitable culmination of the abandonment of the Recess Appointments Clause's clear boundaries. The Executive Branch has gone beyond dubious constitutional interpretations and has now even assumed the role for itself of judging the Senate's own rules. This Court should not allow the Executive Branch to continue its flouting of the Constitution at the Senate's expense.

CONCLUSION

For the foregoing reasons, the Recess Appointments Clause's text, context, history and purpose, the NLRB's appointments in the instant case were constitutionally invalid. The D.C. Circuit's decision should

be affirmed in full and the recess appointment power restored to its properly limited exercise.

Respectfully submitted,

MARK R. LEVIN
MICHAEL J. O'NEILL
MATTHEW C. FORYS
LANDMARK LEGAL FOUNDATION
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176
(703) 554-6100
(703) 554-6119 (Facsimile)

RICHARD P. HUTCHISON
Counsel of Record
LANDMARK LEGAL FOUNDATION
3100 Broadway
Suite 1210
Kansas City, MO 64111
(816) 931-1175
(816) 931-1115 (Facsimile)
rpetehutch@aol.com

Attorneys for Amicus Curiae

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., ET AL.

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

BRIEF OF SENATE REPUBLICAN LEADER MITCH MCCONNELL AND 44 OTHER MEMBERS OF THE UNITED STATES SENATE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING

MIGUEL A. ESTRADA
Counsel of Record
JONATHAN C. BOND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Amici Curiae

Library of Congress
Law Library

QUESTIONS PRESENTED

The Constitution makes the Senate's "Advice and Consent" a condition precedent to the appointment of federal officers, except for inferior officers exempted by Congress. U.S. Const. art. II, § 2, cl. 2. The Recess Appointments Clause, *id.* art. II, § 2, cl. 3, permits the President to "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." But the Senate itself is empowered to "determine the Rules of its Proceedings," *id.* art. I, § 5, cl. 2, including when and how to hold sessions and to adjourn. *Amici* will address the following question:

Whether the President lawfully exercised his authority under the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, when he purportedly appointed three individuals to be Members of the National Labor Relations Board on January 4, 2012, while the Senate's records show that it convened sessions every three days.

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BRIEF OF SENATE REPUBLICAN LEADER MITCH MCCONNELL AND 44 OTHER MEMBERS OF THE UNITED STATES SENATE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT NOEL CANNING

INTEREST OF *AMICI CURIAE*

Amici curiae are Senate Republican Leader Mitch McConnell and 44 other members of the United States Senate (listed in Appendix B). As members of the Senate, *amici* have an unparalleled interest in safeguarding the chamber's constitutionally prescribed role in the appointments process and its authority to prescribe and administer its own procedures—both of which the Executive sought to usurp here. Particularly given Senate rules and practices providing all members of the Senate a meaningful role in the chamber's consideration of appointments, *amici* have a powerful stake in ensuring that the Executive's claim of power to make appointments unilaterally—which the Framers deliberately withheld—is repudiated.[1]

[1] No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Executive's claim that the court of appeals' decision upsets the constitutional structure and deprives the President of power the Framers granted has matters exactly backwards. It is the *President* who, by making the January 2012 recess appointments that the decision below invalidated, usurped two powers the Constitution confers on the *Senate*—and claimed a unilateral appointment authority that the Framers intentionally withheld. Article II gives the Senate a veto over federal appointments, requiring its "Advice and Consent" for appointments to all principal offices (and inferior posts not exempted by Congress). U.S. Const. art. II, § 2, cl. 2. And although the Framers allowed the President to fill "Vacancies that may happen during the Recess of the Senate" with temporary commissions, *id.* art. II, § 2, cl. 3, they reserved to the *Senate* plenary power over "all matters of method," *United States* v. *Ballin*, 144 U.S. 1, 5-6 (1892); *see* U.S. Const. art. I, § 5, cl. 2, including (with few, enumerated exceptions) when and how to hold sessions and when to adjourn.

The January 2012 appointments eviscerated both of these Senate prerogatives. By purporting to appoint principal officers without the Senate's approval, the President contravened the advice-and-consent protocol. As the court of appeals held, those appointments cannot be justified by the Recess Appointments Clause without distorting that provision's text and purpose beyond recognition: The appointments were made neither during "the Recess of the Senate," but instead in an intrasession adjournment, nor to fill "vacancies that ... happen[ed] during the Recess," but to preexisting openings. U.S. Const.

art. II, § 2, cl. 3; *see* Pet. App. 17a-52a. Each of those holdings is correct and sufficient to affirm the court of appeals' judgment.

The January 2012 appointments are also invalid, however, for an additional, independent reason: Even accepting the Executive's strained reading of the Recess Appointments Clause, the President still could not make those appointments without usurping the Senate's exclusive authority over its procedures. The Executive accepts that, at a minimum, Senate adjournments of three days or less are too short to "trigger the President's recess-appointments authority." Pet'r Br. 18. But the January 4, 2012, appointments were made during just such an adjournment; the Senate held scheduled sessions on January 3 and 6. The Executive's claim that the President could disregard those sessions and draw his *own* "conclusion" whether the Senate really convened (*id.* at 45) is a naked assault on Senate self-governance. The President has no power to declare a House of Congress adjourned when it says otherwise—least of all when it is, as here, demonstrably capable of exercising its constitutional authority.

That alone dooms the January 2012 appointments. Indeed, the Court can resolve the case on that basis, without confronting the other questions it presents. If the Court nevertheless addresses those other issues, it should affirm the decision below for the reasons given by the court of appeals and Noel Canning. Noel Canning Br. 8-49. Two specific aspects of the Executive's defense of the appointments, however, pose particular threats to the constitutional structure and warrant special rebuke. Its reliance on supposed Senate acquiescence in the Executive's view of the recess-appointments power is doubly

misplaced: The Senate *cannot* cede its constitutional authority expressly, much less by silence, and in any event it *has not* done so. And the Executive's claim that its rewriting of the Recess Appointments Clause is necessary to *safeguard* the separation of powers turns the constitutional structure upside-down. It is the Executive's theory that would upset the careful balance the Framers struck and dangerously concentrate powers they deliberately divided.

ARGUMENT

I. THE EXECUTIVE HAD NO AUTHORITY AND NO BASIS TO DEEM THE SENATE IN "THE RECESS" WHILE IT CHOSE TO HOLD SESSIONS.

This case raises several important constitutional issues, but the parties' controversy can be resolved by answering one question: Who determines—the Senate, or the President—whether the Senate is in session? The Constitution's text and structure point to only one answer: the Senate. The Executive had no basis for second-guessing its determination here.

A. The Senate's Determinations That It Would Be, And In Fact Was, In Session On Certain Days Are Dispositive.

The January 2012 appointments' legality depends on the President's claimed, but illusory, authority to deem the Senate in "Recess" when it declares itself in session. The Executive has long maintained, and admits even now, that the Senate is *not* in "Recess" for purposes of the Recess Appointments Clause when it has adjourned within a "Session" for three days or fewer. *See* Pet'r Br. 18; Resp't Letter Br. 3, *New Process Steel, L.P.* v. *NLRB*, 130 S. Ct. 2635 (2010) (No. 08-1457); *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 24-25

(1921). And for good reason: Such short breaks do not require even the consent of the House. U.S. Const. art. I, § 5, cl. 4. And it would make little sense to permit the President to fill offices for up to two *years* because the Senate adjourns for two *days*—or even two hours. The January 4, 2012, appointments, however, were made during a three-day adjournment: The Senate held sessions on January 3 and 6. S. Journal, 112th Cong., 2d Sess. 1-2 (2012) (minute book). The appointments are thus invalid *unless* the President has power to declare those sessions nullities.

He does not. The Constitution vests authority to prescribe Senate procedure in the chamber itself. And its official account of its activities is controlling. The Executive's contrary claim has no foothold in the Constitution's text or structure, and if upheld would severely undermine the separation of powers.

1. Analysis of whether the Senate was in session on January 3 and 6, 2012, begins and ends with the Senate's determinations that it was. The Senate alone has power to decide, within wide limits, when and how it will meet, and its account of its actions is authoritative.

a. The Constitution accords the Senate broad authority to prescribe and administer its own procedures. Article I authorizes "[e]ach House" to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. The Rules of Proceedings Clause thus reserves "all matters of method ... to the determination of the house" itself. *Ballin*, 144 U.S. at 5. That authority is indispensable to the Senate's functioning. If it "did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and

order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority." 2 Joseph Story, *Commentaries on the Constitution of the United States* § 835, at 298 (1833). Thus, unless the Senate's procedures overstep another constitutional constraint, or bear no "reasonable relation" whatsoever to their ends, its discretion is "absolute and beyond the challenge of any other body or tribunal." *Ballin*, 144 U.S. at 5. Other branches' speculation that "some other way would be better, more accurate or even more just" is irrelevant. *Ibid.*

The Senate's power over procedure includes generally determining for itself when and how to meet and adjourn. *See* Thomas Jefferson, *Opinion on the Constitutionality of the Residence Bill* (July 15, 1790), *reprinted in* 17 *The Papers of Thomas Jefferson* 194, 195 (1965). The Constitution imposes only modest constraints on the Senate's schedule: It must meet once a year—on January 3, unless Congress establishes another date by law, U.S. Const. amend. XX, § 2, *superseding id.* art. I, § 4, cl. 2—and when called into special session by the President, *id.* art. II, § 3. And once the Senate has convened, it cannot adjourn for more than three days, or to another place, without the House's consent. *Id.* art. I, § 5, cl. 4. The Senate's power over its schedule is otherwise absolute.

The Executive's role regarding the Senate's schedule, in contrast, is sharply circumscribed. He may call the Senate into session on "extraordinary Occasions." U.S. Const. art. II, § 3. And if the House and Senate tender a "Disagreement" concerning adjournments, he can resolve it. *Ibid.* Beyond that, he has no say in Senate meetings and adjournments.

The Framers expressly *excluded* adjournment resolutions from the presentment requirement. *Id.* art. I, § 7, cl. 3. And they *withheld* from the President the power (wielded by the Crown and some States' executives) to "prorogue" legislative sessions unilaterally. The Federalist No. 69, at 417-18 (Alexander Hamilton) (Clinton Rossiter ed., 2003); *see* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1550-53 (2005); *cf.* 3 *The Records of the Federal Convention of 1787*, at 111, 202 (M. Farrand ed., 1911).

b. The Senate not only can decide when it will meet, but also has the final word regarding whether it has done so. More than a century ago, this Court made clear that each House's official accounts of its actions are controlling. *See Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 670-80 (1892). With few exceptions, moreover, each can choose how its accounts shall be kept. *See id.* at 671.

Article I provides that each chamber "shall keep a Journal of its Proceedings," U.S. Const. art. I, § 5, cl. 3, and specifies some matters that must be entered upon it, *ibid.* (yeas and nays, if requested by one-fifth of members present); *id.* art. I, § 7, cl. 2 (reasons for presidential veto, and members voting for and against overriding it). But the Framers otherwise "left to the discretion of the respective houses" how to record and authenticate their actions. *Marshall Field*, 143 U.S. at 671. *Marshall Field* thus rejected a claim that a bill both Houses purported to have passed was not *actually* approved. *See id.* at 672-73. Each chamber's presiding officer had signed the bill, which under extant "rules" and "usage" constituted an "official attestation" of Congress's approval. *Id.* at 671-72, 680.

Where Senate practices do *not* prescribe another method for recording its actions, its Journal should be conclusive. *See Ballin*, 144 U.S. at 4 (to the extent "reference may be had" to the Journal, "it must be assumed to speak the truth"); *see id.* at 9 (enrolled bill *plus* House Journal entry placed bill's passage "beyond challenge"). The Senate is required to record its proceedings in its Journal, *see* U.S. Const. art. I, § 5, cl. 3, and the "presumption in favor of regularity" in Congress's affairs requires other branches to assume it did so faithfully. *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 619 (1929); *see Shapiro* v. *United States*, 335 U.S. 1, 14 n.19 (1948) (presumption applicable to "record of the Senate Committee proceedings").

Ballin demonstrates that either House's determination that it is in session and able to do business is especially immune to second-guessing by outsiders. *Ballin* rejected a challenge to the House's protocol for ascertaining whether it had a quorum. *See* 144 U.S. at 5-6; U.S. Const. art. I, § 5, cls. 1-2. The House rule at issue provided that members who declined to vote but were present "'in the hall of the house'" counted towards a quorum. 144 U.S. at 5 (citation omitted). That procedure, the Court held, was well within its power to prescribe. *See id.* at 5-6. And because the "presence of [a] quorum was determined in accordance with a valid rule theretofore adopted by the house," the chamber's determination that it had a quorum could not be attacked with "parol evidence." *Id.* at 4, 9.

c. These principles make short work of this case. The January 4, 2012, appointments are invalid if the Senate held sessions on January 3 and 6. The Senate's records leave no doubt that it planned to do so,

S. Journal, 112th Cong., 1st Sess. 923 (2011), and did, S. Journal, 112th Cong., 2d Sess. 1-2. The Executive's claim that the "Senate as a body" expressed no "conclusion" that it "was not in recess for purposes of the [Recess Appointments] Clause" (C.A. Resp't Br. 56) is simply false. The order scheduling the sessions and Senate records confirming that they occurred make clear the *Senate's* view that it held sessions both days. The absence of a concurrent resolution allowing the Senate to adjourn for more than three days cements that conclusion.

That the order scheduling the January 3 and 6 meetings described them as "pro forma" and stated that "no business" would "be transacted," S. Journal, 112th Cong., 1st Sess. 923, changes nothing. Longstanding congressional practice confirms that the Senate understood that it was not in "Recess" when it held such meetings. Both Houses have employed pro forma sessions for decades to satisfy two constitutional requirements: the prohibition on adjourning for more than three days without the other's consent, U.S. Const. art. I, § 5, cl. 4, and their duty to meet once annually on January 3, *id.* amend. XX, § 2. *See* Christopher M. Davis, Cong. Research Serv., *Memorandum: Certain Questions Related to Pro Forma Sessions of the Senate* (2012), *reprinted in* 158 Cong. Rec. S5954, S5955 (Aug. 2, 2012); Noel Canning Br. 50-53. The Senate's reliance on such meetings as valid for other constitutional purposes dispels any doubt that it believed its January 3 and 6 sessions were not part of a "continuous ... recess." Pet'r Br. 50. Indeed, the Senate was constitutionally *required* to meet both days: on January 3 by the Twentieth Amendment, U.S. Const. amend. XX, § 2, and on both days by the Adjournments Clause, be-

cause the House and Senate did not agree to adjourn for more than three days, *see id.* art. I, § 5, cl. 4.[2]

The Executive does not dispute that both Houses have long used pro forma sessions to satisfy these constitutional requirements. Instead, it dismisses this practice as irrelevant to the Recess Appointments Clause. *See* Pet'r Br. 60-62; *see also* 2012 OLC Op. at 18-19 & n.25. The Executive, however, has never explained how the Senate could believe itself to be in *session* for purposes of some constitutional provisions, yet simultaneously in "*Recess*" for another.

The best it has offered is the bare assertion that the Adjournments Clause and Twentieth Amendment "relat[e] to internal operations and obligations of the Legislative Branch," C.A. Resp't Br. 49; *see id.* at 53, and "affect the Legislative Branch *alone*," 2012 OLC Op. at 19; *see also* Pet'r Br. 60-62. But the Senate's determination that it is in session for purposes of either provision plainly affects persons outside the Legislative Branch—including the Executive. Whether both chambers are open and able to do business determines whether they can enact legislation governing the Nation that the President must "faithfully execut[e]." U.S. Const. art. II, § 3. And

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[2] Contrary to the Executive's suggestion, the decision to hold pro forma sessions in January 2012 was not "forced by actions of the House." *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. __, slip op. at 2 (Jan. 6, 2012) ("2012 OLC Op."). Had the Senate wished to "Recess" but been blocked by the House, it could have asked the President to resolve the chambers' "Disagreement" by adjourning both to a time he chose. U.S. Const. art. II, § 3. That the Senate did not do so confirms that the chamber itself decided not to "Recess."

whether the Senate has begun a new "Session" under the Twentieth Amendment directly affects when existing recess appointments will expire.[3]

The Senate also has recognized pro forma sessions as valid when they indisputably affect persons outside Congress—even at the expense of Senate interests. Senate Rules require that nominations not "finally acted upon" be returned to the President during intrasession adjournments of more than 30 days. Senate Rule XXXI(6), *Senate Manual*, S. Doc. No. 112-1, at 58 (2011). But when it has convened pro forma sessions for "periods in excess of thirty days," the Senate has *not* returned pending nominations. 158 Cong. Rec. S5955. Additionally, various federal statutes provide for expedited congressional review of Executive actions, and prevent such actions from taking effect before a certain number of days that the Senate, House, or both are in session have elapsed. *See id.* at S5955-56. Against their own interests, the Senate and House have counted days when pro forma sessions are held like any other (as has the Executive). *See ibid.*

Recent history shows, in fact, that the Senate understands pro forma sessions as valid for purposes

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[3] The Executive now contends that pro forma sessions do not satisfy the Adjournments Clause, Pet'r Br. 60-61—and are either *unable* to satisfy the Twentieth Amendment, *id.* at 61 n.60, or *unnecessary* to do so, on the perplexing theory that the Amendment somehow calls Senate sessions into being by operation of law, *whether or not* the Senate convenes, *id.* at 2, 48; C.A. Resp't Br. 50-54. Those claims are untenable for the reasons Noel Canning expounds. Noel Canning Br. 56-58. For present purposes, it suffices that the Executive's claims cannot explain why for decades the Senate and House have held pro forma sessions precisely to comply with these provisions.

of the Recess Appointments Clause *itself*. As the Executive has acknowledged, the Senate Majority Leader has repeatedly explained "that such pro forma sessions break a long recess into shorter adjournments ... thus preventing the President from exercising his constitutional power to make recess appointments." 2012 OLC Op. at 2; *see* 154 Cong. Rec. S7558 (July 28, 2008) (Sen. Reid) ("[T]here will be no recess. We will meet every third day pro forma...."). Indeed, well before 2012, the Senate held "pro forma sessions" *precisely* "to prevent recess appointments." 153 Cong. Rec. S14,609 (Nov. 16, 2007) (Sen. Reid).

Until January 2012, even the *Executive* agreed that pro forma sessions precluded the "Recess of the Senate." In 2010, it informed this Court that "the Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007," Resp't Letter Br. 3, *New Process Steel*, 130 S. Ct. 2635, a period in which it repeatedly held only pro forma sessions for weeks at a time, *see* Joint Comm. on Printing, 112th Cong., *2011-2012 Congressional Directory* 537 (2011). Now that its concession proves inconvenient, the Executive abandons it. Pet'r Br. 58-59. Whether or not its justifications for discarding that view are persuasive, that 2010 admission confirms that when the Senate convened the January 2012 sessions, it had every reason to believe that it was *not* in "the Recess."

2. The Senate's determination that it was in "session" on January 3 and 6, 2012, is dispositive unless it exceeded the chamber's authority. *See Ballin*, 144 U.S. at 5-6. The Executive does not and cannot claim that the Senate's action is ultra vires because it "violate[d]" any "fundamental rights" or is utterly

irrational. *Id.* at 5. It is therefore left to argue that the Senate exceeded some other "constitutional restrain[t]." *Ibid.* But the only violation it alleges is premised on a presidential power that does not exist.

a. The Executive claims that the President can draw his *own* "conclusion that the Senate was in recess," and that by blocking recess appointments by holding pro forma sessions the Senate "strip[ped] the President of his constitutional authority to make" them. Pet'r Br. 20, 45; *see* 2012 OLC Op. at 13-18. But neither the President's claimed ability to determine for himself whether the Senate is really in session, nor his purported freestanding authority to make recess appointments, has any constitutional basis.

The Constitution confers no power on the President to deem otherwise-valid Senate sessions nullities. No provision remotely contains an *express* grant of such authority. The powers that *are* conferred, moreover, only underscore the narrow limits of the President's role. He may summon the Senate into special session. U.S. Const. art. II, § 3. But he cannot determine independently whether a quorum is present, or compel its presence—powers the Constitution reserves to the Senate, *see id.* art. I, § 5, cls. 1-2. And he can break a tie when the Senate and House "[d]isagre[e]" concerning adjournments. *Id.* art. II, § 3. But unlike the Crown, he cannot prorogue them as he pleases.

Contrary to the Executive's claim, the President also has no *implied* power to disregard Senate sessions—pro forma or otherwise—in order to protect his recess-appointments "authority" from being "unilaterally extinguish[ed]." Pet'r Br. 45; *see* 2012 OLC Op. at 9 n.13. The freestanding power of the Execu-

tive's imagining needs no such protection—because it does not exist. The authority the Recess Appointments Clause confers is purely *contingent*. It arises only if the Senate chooses to "Recess." If the Senate chooses to remain in session, the President's power is not "extinguish[ed]," but simply never arises. And that remains the case whatever the reasons for the Senate's decision, even if—*especially* if—the Senate purposefully remains in session to enforce compliance with Article II's advice-and-consent protocol.

The Recess Appointments Clause, in fact, was not designed for the Executive's benefit, but for the *Senate's*. The alternative was to require the Senate to remain "continually in session for the appointment of officers," which would "improper[ly]" burden the chamber. The Federalist No. 67, at 408 (Alexander Hamilton); 3 Story, *supra*, § 1551, at 410. The Framers avoided those burdens by allowing the chamber to recess—and enabled the President, *if the Senate does so*, to make temporary appointments. The Senate thus cannot, by *declining* to adjourn, deprive the President of any power. If it does not enter "the Recess," the President's "auxiliary" power to make recess appointments (The Federalist No. 67, at 408) is never triggered, and the ordinary, advice-and-consent appointments process must be obeyed.

b. Permitting the President to deem the Senate in "Recess" unilaterally, moreover, would directly undermine the constitutional structure. All too familiar with "'manipulation of official appointments'" by the Executive, *Freytag* v. *Comm'r*, 501 U.S. 868, 883 (1991) (citation omitted), the Framers intentionally withheld from the President power to appoint officers unilaterally. *See* The Federalist No. 76, at 455-56 (Alexander Hamilton). They instead gave the

Senate a veto over appointments except for offices Congress itself exempts. U.S. Const. art. II, § 2, cl. 2. Requiring the Senate's "Advice and Consent," *ibid.*, they recognized, would "serv[e] both to curb Executive abuses of the appointment power and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Edmond* v. *United States*, 520 U.S. 651, 659 (1997) (citations omitted; second alteration in original). The chamber's exercise of its authority would be checked by the political process, not by the President. *See id.* at 659-60. The Senate is thus expressly empowered to prevent appointments—and entitled to insist, by remaining in session, that the President secure its consent before granting commissions.

Allowing the President to override the Senate's determination that it is in session would preclude the Senate from performing its advice-and-consent responsibility—and grant the President the very powers the Framers withheld to prorogue the Senate at his pleasure and appoint principal officers unilaterally. If the President can deem the Senate not "available" (Pet'r Br. 45) based on his opinion of its work—as he did here, grading its performance by counting how many bills it passes, how many speeches are given, how long sessions last, etc., *id.* at 48—nothing prevents him from sidestepping the Senate whenever it does not swiftly approve his nominees. That would leave "Advice and Consent" a dead letter. Indeed, the President might declare the chamber unavailable because partisan divisions make confirmation improbable—or because it is too busy with other matters to confirm appointments immediately.

The President, in fact, did *exactly that* here. He waited less than three weeks after nominating two individuals to recess-appoint them. *See* Pet. App. 15a-16a; 157 Cong. Rec. S8691 (Dec. 15, 2011). And he explicitly made another recess appointment the same day because he perceived that the Senate opposed his nominee, and he "refuse[d] to take no for an answer." 2012 Daily Comp. Pres. Docs. No. 00003, at 3 (Jan. 4, 2012). It should be alarming in a republic to hear one branch of government declare another branch incapacitated—simply because the latter disagrees, or merely moves too slowly—and claim power to govern alone.

c. The Executive doubtless will disavow any future ambition to circumvent advice and consent. But its theory lacks any limiting principle that could prevent such abuse going forward. The simple but central premise of the separation of powers is that "[g]ood fences make good neighbors." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 240 (1995). The Executive identifies no principled, enforceable barrier capable of preventing future encroachments. Even an explicit Executive promise not to use recess appointments to sidestep the Senate cannot suffice. The Constitution's structural safeguards, no less than its guarantees of individual liberties, do not leave the Nation "at the mercy of *noblesse oblige*." *United States* v. *Stevens*, 130 S. Ct. 1577, 1591 (2010).

The Executive's track record regarding recess appointments well illustrates why. Nearly every limit on recess appointments heretofore solemnly embraced by the Executive, starting with the Washington Administration, has been serially swept aside. *Compare* Edmund Randolph, *Opinion on Recess Ap-*

pointments (July 7, 1792), *reprinted in* 24 *The Papers of Thomas Jefferson* 165, 166 (1990) (vacancy must arise during recess), *President—Appointment of Officers—Holiday Recess*, 23 Op. Att'y Gen. 599, 603 (1901) (intrasession recess appointments forbidden), *and* 33 Op. Att'y Gen. at 24-25 (intrasession adjournment of ten days insufficient), *with* 2012 OLC Op. at 4-23 (we were just kidding). One is left to wonder whether any Executive pledge concerning recess appointments can survive the controversy that occasions it.

The Framers wisely did not trust the "great security against [the] gradual concentration of ... powers" to Executive assurances of good faith. The Federalist No. 51, at 318 (James Madison). It is unthinkable that they made an unwritten exception for appointments, "'the most insidious and powerful weapon of eighteenth century despotism.'" *Freytag*, 501 U.S. at 883 (citation omitted).

B. The Senate Is Not In "The Recess" When It Convenes Pro Forma Sessions.

Even if the Senate's determinations that it held sessions on January 3 and 6 were not controlling, the Executive had no basis to disregard them here. The Executive argues that the Senate was really in "Recess" when it convened pro forma sessions because it could not "participate as a body in the appointments process" and was not "available to provide advice and consent." Pet'r Br. 45. That is demonstrably incorrect. The Executive's claim conflates the Senate's *availability* to act with its *willingness* to do so.

1. The Senate is entirely capable of exercising its constitutional powers during pro forma sessions. Like any other session, all of the personnel necessary to do business are present, including at least: the

presiding officer; if there is to be a change in the governing unanimous-consent agreement, often at least one other Senator; the Senate Parliamentarian (or representative); the Bill or Legislative Clerk; the Journal Clerk; and the Reporter of Debates. With these dramatis personae on hand, the Senate can engage in any business it chooses—including passing legislation.

Indeed, the Senate did so—twice—in the months preceding the January 2012 appointments. On August 5, 2011, during a pro forma session indistinguishable from those on January 3 and 6, 2012, it passed the Airport and Airway Extension Act of 2011, Part IV, by unanimous consent, S. Journal, 112th Cong., 1st Sess. 583; *cf.* 157 Cong. Rec. S5292 (Aug. 2, 2011), which the President signed into law, *see* Pub. L. No. 112-27, 125 Stat. 270 (2011). And on December 23, 2011, in a pro forma session scheduled by the same order as the January 3 and 6 sessions, the Senate passed another bill by unanimous consent, *see* S. Journal, 112th Cong., 1st Sess. 923-24; Pub. L. No. 112-78, 125 Stat. 1280 (2011)—at the President's own urging, *see* 2011 Daily Comp. Pres. Docs. No. 00962, at 1-2 (Dec. 22, 2011).[4]

The Senate's passage of legislation during pro forma sessions erases any doubt that it can act on

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[4] The Senate also has taken other legislative action in pro forma sessions—including appointing (or authorizing appointment of) conferees, as it did on December 23, 2011, S. Journal, 112th Cong., 1st Sess. 924; *see also, e.g.*, 152 Cong. Rec. S11,107-08, D1118 (Dec. 4, 2006); *cf. id.* at S11,105-06 (Nov. 16, 2006), and reading and calendaring bills reported out of committee, *see, e.g.*, 150 Cong. Rec. S9363 (Sept. 16, 2004); *cf. id.* at S9361 (Sept. 15, 2004).

appointments during such sessions, using the same unanimous-consent procedure. "*[M]ost* nominations," in fact, are confirmed by unanimous consent. Elizabeth Rybicki, Cong. Research Serv., RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure* 9 (2013) (emphasis added).[5] The Senate also can perform other critical appointments-related functions during pro forma sessions—including receiving nominations and referring them to committee, *see*, *e.g.*, 152 Cong. Rec. S11,106, S11,109-10, D1118; *cf.* 157 Cong. Rec. S14 (Jan. 5, 2011) (standing order authorizing Secretary of Senate "to receive messages from the President"). The Senate is thus unquestionably *capable* of "particip[ing] as a body in the appointment process" (Pet'r Br. 45) during pro forma sessions.

2. The Executive rejoins that the January 3 and 6 sessions were nevertheless part of an uninterrupted 20-day "Recess" because the scheduling order provided that "'no business'" *would* be "'conducted.'" Pet'r Br. 48 (citation omitted). By the Executive's lights, the Senate was "barred ... from conducting any business," *ibid.*, and its passage of legislation in prior pro forma sessions illustrates only the "remote possibility" that it could change its mind and resume business—just as it might return early from a recess, *id.* at 52. The Executive's argument misunderstands

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[5] *E.g.*, 149 Cong. Rec. S5929 (May 8, 2003) (confirming John G. Roberts, Jr., to U.S. Court of Appeals for the D.C. Circuit); 138 Cong. Rec. S12,290 (Aug. 11, 1992) (confirming, *inter alios*, Sonia Sotomayor to U.S. District Court for Southern District of New York); 136 Cong. Rec. S5281 (Apr. 27, 1990) (confirming, *inter alios*, David H. Souter and Samuel A. Alito, Jr., to U.S. Courts of Appeals for the First and Third Circuits, respectively).

the Senate's order and basic tenets of Senate procedure.

The "no business" proviso in the scheduling order did *not* preclude the Senate from acting. It remained entirely free to conduct business by unanimous consent, whenever it chose—as it did in August and December 2011. The Senate can *always* "suspen[d]" its rules and procedures by unanimous consent—even "without notice." Senate Rule V(1). A unanimous-consent agreement—like the December 17 order scheduling the pro forma sessions—thus can be "supersede[d]" at any time by a new unanimous-consent agreement. Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 1354 (1992) ("*Riddick's*"). In reality, all that such "no business" orders do is require that any business be done by unanimous consent—the procedure by which the Senate conducts *most* business, *see id.* at 1311; Walter J. Oleszek, Cong. Research Serv., RL33939, *The Rise of Unanimous Consent Agreements* 6 (2008). This method lies squarely within the Senate's exclusive power over procedure; others' opinions that "some other way would be better" have no bearing. *Ballin*, 144 U.S. at 5.

The Executive is therefore incorrect that Senators who do not attend pro forma sessions have "assurance that they [can] leave ... without concern that any business would be conducted." Pet'r Br. 55. Each absent member assumes the risk that the Senate will act in his absence. Indeed, so far as Senate Rules are concerned, nothing prevented the members presiding on January 3 and 6—members of the President's own party, S. Journal, 112th Cong., 2d Sess. 1-2 (Sens. Warner and Webb)—from confirming any

pending nominations by unanimous consent. It is the Senate's traditions of trust, consensus, and collegiality—and the universal recognition that political Armageddon would ensue—that prevent such gambits. But that only underscores that the Senate *as a body* has chosen to govern itself by these rules.[6]

The Executive's claim that superseding a "no business" order is equivalent to returning early from an adjournment (Pet'r Br. 52-55) is equally incorrect. When the Senate holds pro forma sessions, it is *in session*; it has simply chosen not to engage in business other than by unanimous consent. When it is adjourned, in contrast, it cannot act *at all*. The better analogy is instead to instances where the Senate remains in session but chooses not to engage in *particular* business. The Senate, for example, frequently schedules periods in which it will meet "for debate only." *E.g.*, 159 Cong. Rec. S7708 (Oct. 31, 2013); 158 Cong. Rec. S8530 (Dec. 30, 2012); 157 Cong. Rec. S2585 (May 2, 2011). In such instances, as in pro forma sessions, the chamber remains perfectly *capable* of doing other business, provided the Senate unanimously consents. No reasonable reader of the Recess Appointments Clause—at the Founding or today—would conclude that the Senate is in "Recess," even if *every* Senator is present, merely because they have agreed to engage only in debate for a given period.

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[6] For the same reasons, the Executive's claim that the President "rel[ied] on the Senate's order that no business would be conducted" (Pet'r Br. 51) is meritless. Moreover, he *did not* assume that the Senate would not do business, and indeed successfully *urged* it to pass legislation. *Supra* at 18.

Yet that is exactly how the Executive interprets the Recess Appointments Clause. Indeed, its view means that the President can declare the Senate constructively adjourned whenever it chooses not to conduct the *specific* business of acting on appointments. On the Executive's theory, recess appointments are permissible when the Senate decides during presidential-election years not to act on judicial nominations or hold further confirmation hearings "without agreement." 150 Cong. Rec. S11,831 (Nov. 20, 2004) (Sen. Leahy).

At bottom, the Executive's claim equates the Senate's *ability* to act with its *willingness* to do so. But the two are worlds apart. The Recess Appointments Clause permits filling vacancies that arise when the Senate, due to its Recess, *cannot* advise and consent to appointments. It does not permit the President to circumvent the chamber merely because it declines to confirm his nominees—or takes longer than he would like. The Senate is constitutionally *entitled* to withhold its consent; doing so cannot possibly provide a predicate for bypassing it entirely.

3. Unable to prove that the Senate cannot act on appointments during pro forma sessions, the Executive offers a hodgepodge of "hallmarks of a recess" supposedly present on January 3 and 6. Pet'r Br. 47. The Executive does not articulate any actual test to be applied with these factors. Nor does it identify any constitutional basis for its arbitrary assemblage of "hallmarks," undoubtedly because none exists. The best it offers is a self-serving Executive Branch opinion, *see id.* at 46 (citing 33 Op. Att'y Gen. at 24-25), which purported to distill the Senate's own understanding of "the Recess" from a Senate Judiciary Committee report issued to *protest* another type of

recess-appointments abuse, *see* S. Rep. No. 58-4389 (1905) ("1905 Report"), *reprinted in* 39 Cong. Rec. 3823 (Mar. 2, 1905). But the 1905 Report does not remotely support the Executive's I-know-it-when-I-see-it notion of "Recess."[7]

The 1905 Report denounced recess appointments President Roosevelt made during an instantaneous "constructive" intersession recess that supposedly occurred when one Senate Session was terminated automatically by the beginning of the next. *See* 39 Cong. Rec. 3823-24. The Report argued that such an artificial, illusory break did not constitute "the Recess" because the chamber continued meeting without interruption. *Ibid.* The indicia it cited to distinguish a genuine "Recess" from ersatz adjournments—that the members "owe no duty of attendance," that the "Chamber is empty," that it cannot "receive communications from the President," etc.—were *necessary* conditions for "the Recess" to occur. *Id.* at 3823. The Report nowhere suggests that those factors alone are *sufficient* to render the Senate in "Recess" when it declares itself in session. It underscores, moreover, that when the Senate can "exercise its function of advice and consent"—as it can during

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[7] The Executive alludes (at 46-47) to the Pocket Veto Clause, U.S. Const. art. I, § 7, cl. 2, curious given its insistence that that Clause "does not determine the meaning of the Recess Appointments Clause." C.A. Resp't Br. 55. Indeed, the Pocket Veto Clause refutes the Executive's approach to recess appointments: It explicitly requires inquiry not only into whether Congress has "[a]djourn[ed]," but *also* into the adjournment's *effect—i.e.*, whether it "prevent[ed] [the] return" of a vetoed bill. U.S. Const. art. I, § 7, cl. 2. The Recess Appointments Clause, in contrast, calls for no such analysis of effects.

pro forma sessions—recess appointments are off-limits. *Id.* at 3824.

In any case, the Executive's grab-bag of factors does not help it here. The number of bills passed or other actions taken (Pet'r Br. 48) does not prove anything about whether the Senate *could* do business if it chose. *Cf.* S. Journal, 113th Cong., 1st Sess. 431 (2013) (minute book). Nor does the number of speeches. Pet'r Br. 48. The short duration of pro forma sessions (*ibid.*) likewise bears no correlation to the Senate's ability to act—as its passage of legislation during a two-minute pro forma session amply demonstrates, *see* S. Journal, 112th Cong., 1st Sess. 923-24.

The Executive's claim that Senators "'owed no duty of attendance'" (Pet'r Br. 49 (citation and alteration omitted)) also adds nothing, because it is not true. "Senators are required to attend *all* sessions of the Senate unless they are excused." *Riddick's* at 214 (emphasis added); *see* Senate Rule VI(2). Nothing in the order scheduling pro forma sessions excused them. S. Journal, 112th Cong., 1st Sess. 923; Pet. App. 91a-92a.

The Executive's assertion—based on C-SPAN footage, Pet'r Br. 49—that few Senators actually obeyed that duty is doubly irrelevant. First, the Senate can be in session *whether or not* a quorum is present. The Constitution itself contemplates that fewer will be present while the Senate is in session. *See* U.S. Const. art. I, § 5, cl. 1 ("smaller Number may adjourn from day to day" and, if authorized, "compel the Attendance of absent Members"). Indeed, aside from roll-call votes, it is "unusual" for 51 Senators to be present on the floor. Elizabeth Ry-

bicki, Cong. Research Serv., 96-452, *Voting and Quorum Procedures in the Senate* 1 (2013).

Second, even if a quorum *were* necessary for a Senate session to be valid, the fact that the *Senate* made no determination that one was lacking on January 3 or 6 should be dispositive, the Executive's nose-counting notwithstanding. The Senate made no such determination because it "operates on the assumption that a quorum is present regardless of how few or how many are in attendance, until someone suggests the absence of a quorum," *Riddick's* at 214, which any Senator may do "at any time," Senate Rule VI(3). The Senate, in other words, has provided that a quorum is *presumed* present until proven otherwise. The Executive does not dispute the validity of that procedure—one plainly within the Senate's power to prescribe. *See Ballin*, 144 U.S. at 5; *cf. Nixon* v. *United States*, 506 U.S. 224, 237-38 (1993) ("final authority" over method to "try" impeachments "committed to the Senate"). It accordingly cannot question the Senate's determination that a quorum was present based on "parol evidence," be it C-SPAN video or its 1890s equivalent. *Ballin*, 144 U.S. at 5.

The Executive's observation that the Secretary of the Senate invoked the chamber's standing authorization "'to receive messages from the President'" in between other pro forma sessions is particularly puzzling. Pet'r Br. 50 (citation omitted). The Senate's ability to "receive communications from the President" is, on the Executive's own view, a reason *not* to declare it constructively adjourned. *Id.* at 45. Even if the Recess Appointments Clause, like the Pocket Veto Clause, required analysis of the effect of an adjournment, the Senate's ability to receive messages through its Secretary would cut *against* the Execu-

tive's claim that it was actually absent. *Cf. Wright* v. *United States*, 302 U.S. 583, 592-98 (1938). That the President's messages were not immediately laid before the chamber does not prove it was not sitting. The President cannot declare a House of Congress adjourned because it does not drop everything upon receiving his missives or promptly return his calls.

II. THE EXECUTIVE'S CLAIMS OF SENATE ACQUIESCENCE AND AGGRANDIZEMENT ARE BASELESS AND CANNOT JUSTIFY DISTORTING THE CONSTITUTIONAL TEXT AND STRUCTURE.

The Court can decide this case without resolving the first two questions presented concerning the Recess Appointments Clause's scope. If it reaches those two questions, it should affirm for the reasons explained by the court of appeals and Noel Canning. *See* Pet. App. 17a-52a; Noel Canning Br. 8-49. Two planks in the Executive's argument against the decision below merit special reprobation—both because they are particularly misguided, and because their implications extend far beyond this case: The Executive's claim that supposed Senate acquiescence in the Executive's reading of the Recess Appointments Clause supports that interpretation has no basis in law or fact. And its contention that the Clause must be construed expansively to safeguard the separation of powers turns the constitutional structure on its head.

A. The Senate Could Not And Did Not Acquiesce In The Executive's Reading Of The Recess Appointments Clause.

The Executive's case for its expansive, atextual view of the Recess Appointments Clause rests heavily on purported historical practice. Pet'r Br. 21-28, 35-44. But its appeal to history does not take the

typical form. Here there is no colorable claim of an unbroken, unchallenged practice supporting its position from the Founding forward—or even in early Congresses—that might provide "'evidence" of the Constitution's *meaning*.'" *Printz* v. *United States*, 521 U.S. 898, 905 (1997) (emphasis added) (quoting *Bowsher* v. *Synar*, 478 U.S. 714, 723-24 (1986)); *cf. Myers* v. *United States*, 272 U.S. 52, 175 (1926). The first Attorney General forswore recess appointments to preexisting vacancies. *See* Randolph, *supra*, at 166. And his successors disclaimed power to make intrasession appointments until the twentieth century. *See* 23 Op. Att'y Gen. at 603. The Executive's abandonment of those limitations shows not that the Clause's text allows such appointments, but that the Executive now finds those textual strictures too confining. As the Executive once understood, such "argument[s] from inconvenience ... can not be admitted to obscure the true principles" of the Constitution. *Ibid.*

The Executive's historical claim is instead that a practice rejected for many years but embraced decades later by the Executive has become the constitutional boundary line because the Senate allegedly has "acquiesce[d]" in or "accepted" that practice. *See* Pet'r Br. 20, 26-27, 35-38; *cf. Evans* v. *Stephens*, 387 F.3d 1220, 1226-27 (11th Cir. 2004) (en banc); *United States* v. *Woodley*, 751 F.2d 1008, 1010-11 (9th Cir. 1985) (en banc); *United States* v. *Allocco*, 305 F.2d 704, 714 (2d Cir. 1962). The Executive's acquiescence theory is fundamentally flawed both in principle and in application.

1. The Executive's acquiescence claim erroneously assumes that the Senate can forfeit its powers under the Appointments Clause. This Court has made

clear, however, that neither Congress nor the President can even "*waive* th[e] structural protection[s]" that that Clause or others establish—because those protections are not theirs to give away. *Freytag*, 501 U.S. at 880 (emphasis added). "The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Ibid.* The Constitution's structural constraints do not shield only the political branches themselves, but "protect the individual as well," *Bond* v. *United States*, 131 S. Ct. 2355, 2365 (2012), providing essential safeguards for individual liberty, *see Clinton* v. *City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

Whatever light prior practice may shed on the meaning of powers the Constitution confers, it thus cannot transfer power from one branch to another—any more than it can "'create power,'" *Medellín* v. *Texas*, 552 U.S. 491, 531-32 (2008) (citation omitted). "[O]ne Congress cannot yield up its own powers, much less those of other Congresses to follow." *Clinton*, 524 U.S. at 452 (Kennedy, J., concurring); *cf. Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). That is especially true of the Senate here. While *Congress* may authorize unilateral appointment of inferior officers, U.S. Const. art. II, § 2, cl. 2, or allow designation of acting officials, Pet. App. 44a-45a, the Senate *alone* cannot authorize aberrations from Article II's appointments protocol.

And what the Senate cannot waive affirmatively, it assuredly cannot forfeit by *inaction*. Drawing inferences from "*congressional* silence" is a particularly "precarious" project, given the "various veto-gates" and other obstacles that may prevent Congress from acting for "reasons [that] have nothing to do with the

ideas of institutional agreement or waiver undergirding theories of acquiescence." Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411, 448 (2012) (emphasis added). Even Congress's "failure to overturn" other branches' reading of *statutes* does not "represen[t] affirmative congressional approval." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) (internal quotation marks omitted). *A fortiori*, congressional inaction in response to *constitutional* trespasses is hardly proof of tacit assent.

2. The Senate, at any rate, has not gone gentle into the good night, but has protested the Executive's encroachments at every turn. When nineteenth-century Presidents asserted authority to make recess appointments to preexisting vacancies, the Senate strenuously objected. *See* S. Rep. No. 37-80, at 3 (1863) (vacancy must arise "after one session has closed and before another session has begun"); 38 Annals of Cong. 489, 500 (1822) (Military Affairs Committee report) (President "had no power to make" appointments to fill offices created during Senate session "because the vacancies did not *happen* in the recess of the Senate"). It also took action. In 1863, it passed what is now the Pay Act, Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646, *codified as amended at* 5 U.S.C. § 5503, withholding pay from recess appointees to preexisting vacancies for the express purpose of curtailing such appointments. *See, e.g.*, Cong. Globe, 37th Cong., 3d Sess. 564-65 (Jan. 28, 1863). That is the antithesis of acquiescence.

The Executive cites exceptions that Congress later added to the Pay Act's categorical ban as proof that Congress approves some recess appointments to

preexisting vacancies. Pet'r Br. 37. But those exceptions are hardly an endorsement of invalid appointments. They reflect at most a desire not to punish public servants caught in the crossfire for the sins of their patron. The specific exceptions Congress carved out, moreover, cover circumstances in which it is least likely that the President used recess appointments to circumvent Senate opposition to a nominee: cases where a "vacancy arose within 30 days before the end" of the Senate's session—in which vetting, nominating, and confirming a successor might legitimately be difficult; where a nomination was pending at the end of a session for a nominee *not* already holding a recess appointment; or where the Senate rejects a nominee less than 30 days before adjourning and the President then recess-appoints someone *else*. 5 U.S.C. § 5503(a)(1)-(3).

Nor has the Senate acquiesced in intrasession recess appointments. As Noel Canning chronicles, throughout the nineteenth century, members of the Senate consistently denied that the President can make such appointments. *See* Noel Canning Br. 19-20. The Executive also inflates the extent of the practice to which the Senate supposedly assented. *Id.* at 24-25. And even the Executive does not allege any were made for at least *eight decades* after ratification. *See* Pet'r Br. 21. It offers the 1905 Report, *id.* at 24—which opposed Executive abuses concerning putative *intersession* recess appointments—but that Report nowhere hints that the Senate believed the President may make intrasession appointments,

which the Executive had recently disavowed, 23 Op. Att'y Gen. at 603.[8]

In short, even if the Executive's allegations of Senate acquiescence were relevant to the Constitution's meaning (and they are not), a reasonable fact-finder could reach only one conclusion: Not proved.

B. It Is The Executive's Interpretation Of The Recess Appointments Clause, Not The Court Of Appeals' Reading, That Threatens The Separation Of Powers.

Most misguided and pernicious of all is the Executive's claim that its revision of the Recess Appointments Clause is necessary to *safeguard* the constitutional structure. *See* Pet'r Br. 19-20, 31-34, 63-64. Quite the contrary, it is the Executive's position that puts the separation of powers in grave danger.

The Executive's case for blue-penciling boils down to its belief that unless the President can fill already-vacant offices whenever the Senate is not present to approve appointments, he cannot fulfill his "responsibility to 'take Care that the Laws be faithfully executed.'" Pet'r Br. 19 (quoting U.S. Const. art. II, § 3). That argument erroneously presumes that the President is constitutionally entitled to prompt confirmation of his nominees. The Constitution squarely refutes that premise. The Framers deliberately gave the Senate a *veto* over most ap-

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[8] The contrary view expressed in the 1940s by one subordinate "legislative officer," Pet'r Br. 26 (citing 28 Comp. Gen. 30, 34 (1948))—which, in attempting to describe extant law, mistook the Attorney General's later distortion of the 1905 Report as settled doctrine—does not even purport to reflect the views of the Senate itself.

pointments. U.S. Const. art. II, § 2, cl. 2. The Senate is free to reject nominees, or to take no action at all. The President's inability to fill offices at will, therefore, is not an evil the Framers aimed to avoid. It is an essential feature of the constitutional structure they designed.

In any event, rumors of the take-care power's demise are greatly exaggerated. The advice-and-consent process does not preclude filling offices, but merely requires compromise (as the Framers intended). Any doubt is erased by the Senate's recent confirmation of different nominees for the very posts the January 2012 appointments filled. Pet'r Br. 7 n.3. Moreover, Congress can, if it chooses, vest appointment of inferior officers in the "President alone" or "Heads of Departments." U.S. Const. art. II, § 2, cl. 2. And for principal offices Congress determines should never be vacant, it can authorize temporary designation of *acting* officers—as it has done. *See* Pet. App. 44a-45a (collecting statutes). The Executive's claim that forcing the President to rely for "significant periods" on acting officers whom he did not select "impinge[s] on" Executive authority and accountability (Pet'r Br. 34) is not a reason why recess appointments should be expanded, but a transparent attack on the advice-and-consent requirement itself. Only the President's failure promptly to nominate a candidate *acceptable to the Senate* would cause a principal office to remain vacant for many months on end.

The Executive's atextual view thus is not necessary to preserve the Constitution's balance of power. Indeed, it would do just the opposite. Armed with authority to appoint any officer, whenever he concludes that the Senate is "unavailable," Pet'r Br. 11,

for up to two years at a time, the President could effectively exclude the Senate from the appointments process altogether. The Executive's assurance that the Senate can "vote on the President's nominees" when it is back in session (*id.* at 63) offers cold comfort. Recess appointees remain in office until "the End of [the Senate's] next Session" regardless of the Senate's views. U.S. Const. art. II, § 2, cl. 3. And if the President can fill offices without advice and consent for two-year stints, he need not make conventional nominations to many offices at all. Indeed, the Executive's efforts to show how commonplace recess appointments have become, *see* Pet'r Br. 21-28, 35-38; *id.* App. 1a-88a—given that most recent recess appointees have previously been nominated to the same posts[9]—illustrate the reality of such evasion.

Emptiest of all is the Executive's pledge that the Senate can prevent recess appointments by "remain[ing] 'continually in session.'" Pet'r Br. 63 (citation omitted). The President expressly claims the power to determine *for himself* whether the Senate is in a "'real'" session, *id.* at 46 (citation omitted)—and invoked that purported power here to override the Senate's determination that it *was* in session. The ability to remain in session and block appointments only at the President's pleasure is a feeble bulwark indeed.

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[9] *See* Henry B. Hogue & Maureen Bearden, Cong. Research Service, R42329, *Recess Appointments Made by President Barack Obama* 7 (2012); Henry B. Hogue & Maureen Bearden, Cong. Research Service, RL33310, *Recess Appointments Made by President George W. Bush, January 20, 2001-October 31, 2008*, at 1, 5 (2008).

The Executive, at bottom, seeks nothing less than the very unilateral appointments authority that the Framers deliberately withheld. And its position would combine the powers that they strove to separate. The Court should not countenance such encroachment on the "great security" against "concentration of ... powers" so "essential to the preservation of liberty." The Federalist No. 51, at 318. It should repudiate the Executive's overreaching and reaffirm the continuing vitality of the constitutional structure.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

MIGUEL A. ESTRADA
Counsel of Record
JONATHAN C. BOND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Amici Curiae

November 25, 2013

APPENDIX

APPENDIX A

The Constitution of the United States, Article I, Section 3, Clause 2 provides:

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

The Constitution of the United States, Article I, Section 4, Clause 2 provides:

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

The Constitution of the United States, Article I, Section 5, Clause 1 provides:

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

The Constitution of the United States, Article I, Section 5, Clause 2 provides:

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

The Constitution of the United States, Article I, Section 5, Clause 3 provides:

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

The Constitution of the United States, Article I, Section 5, Clause 4 provides:

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

The Constitution of the United States, Article I, Section 7, Clause 2 provides:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

The Constitution of the United States, Article I, Section 7, Clause 3 provides:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

The Constitution of the United States, Article II, Section 2, Clause 2 provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Constitution of the United States, Article II, Section 2, Clause 3 provides:

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

The Constitution of the United States, Article II, Section 3 provides:

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

The Twentieth Amendment to the Constitution of the United States, Section 2 provides:

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 5503 of Title 5, United States Code, provides:

> (a) Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate. This subsection does not apply—
>
> > (1) if the vacancy arose within 30 days before the end of the session of the Senate;
> >
> > (2) if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or
> >
> > (3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.
>
> (b) A nomination to fill a vacancy referred to by paragraph (1), (2), or (3) of subsection (a) of this section shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate.

Section 153(b) of Title 29, United States Code, provides:

> **(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal**
>
> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

Rule V of the Standing Rules of the Senate provides:

SUSPENSION AND AMENDMENT OF THE RULES

1. No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof. Any rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided by the rules.

2. The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.

Rule VI of the Standing Rules of the Senate provides:

QUORUM—ABSENT SENATORS MAY BE SENT FOR

1. A quorum shall consist of a majority of the Senators duly chosen and sworn.

2. No Senator shall absent himself from the service of the Senate without leave.

3. If, at any time during the daily sessions of the Senate, a question shall be raised by any Senator as to the presence of a quorum, the Presiding Officer shall forthwith direct the Secretary to call the roll and shall announce the result, and these proceedings shall be without debate.

4. Whenever upon such roll call it shall be ascertained that a quorum is not present, a majority of the Senators present may direct the Sergeant at Arms to request, and, when necessary, to compel the attendance of the absent Senators, which order shall be determined without debate; and pending its execution, and until a quorum shall be present, no debate nor motion, except to adjourn, or to recess pursuant to a previous order entered by unanimous consent, shall be in order.

Rule XXII(1) of the Standing Rules of the Senate provides:

PRECEDENCE OF MOTIONS

1. When a question is pending, no motion shall be received but—

To adjourn.

To adjourn to a day certain, or that when the Senate adjourn it shall be to a day certain.

To take a recess.

To proceed to the consideration of executive business.

To lay on the table.

To postpone indefinitely.

To postpone to a day certain.

To commit.

To amend.

Which several motions shall have precedence as they stand arranged; and the motions relating to adjournment, to take a recess, to proceed to the consideration of executive business, to lay on the table, shall be decided without debate.

...

Rule XXXI(6) of the Standing Rules of the Senate provides:

EXECUTIVE SESSION—PROCEEDINGS ON NOMINATIONS

...

6. Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President.

APPENDIX B

The following members of the United States Senate respectfully join the foregoing brief as *amici curiae*:

Senate Republican Leader Mitch McConnell

Senator Lamar Alexander

Senator Kelly Ayotte

Senator John Barrasso

Senator Roy Blunt

Senator John Boozman

Senator Richard Burr

Senator Saxby Chambliss

Senator Daniel Coats

Senator Tom Coburn

Senator Thad Cochran

Senator Susan M. Collins

Senator Bob Corker

Senator John Cornyn

Senator Mike Crapo

Senator Ted Cruz

Senator Michael B. Enzi

Senator Deb Fischer

Senator Jeff Flake

Senator Lindsey Graham

Senator Chuck Grassley

Senator Orrin G. Hatch

Senator Dean Heller

Senator John Hoeven

Senator James M. Inhofe

Senator Johnny Isakson

Senator Mike Johanns

Senator Ron Johnson

Senator Mark Kirk

Senator Mike Lee

Senator John McCain

Senator Jerry Moran

Senator Lisa Murkowski

Senator Rand Paul

Senator Rob Portman

Senator James E. Risch

Senator Pat Roberts

Senator Marco Rubio

Senator Tim Scott

Senator Jeff Sessions

Senator Richard C. Shelby

Senator John Thune

Senator Patrick J. Toomey

Senator David Vitter

Senator Roger F. Wicker

APPENDIX C

Senate Journal, 112th Cong., 1st Sess. 583 (2011)

. . .

FRIDAY, AUGUST 5, 2011

(Legislative day of Tuesday, August 2, 2011)

Mr. BENJAMIN L. CARDIN, from the State of Maryland, called the Senate to order at 10 a.m., and

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The Legislative Clerk read the following communication from the PRESIDENT pro tempore:

U.S. SENATE
PRESIDENT PRO TEMPORE,
Washington, DC, August 5, 2011.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable BENJAMIN L. CARDIN, a Senator from the State of Maryland, to perform the duties of the Chair.

DANIEL K. INOUYE,
PRESIDENT pro tempore.

Mr. CARDIN took the chair.

AIRPORT AND AIRWAY EXTENSION ACT OF 2011, PART IV

By unanimous consent, on the request of Mr. WEBB,

The Senate proceeded to consider the bill (H.R. 2553) to amend the Internal Revenue Code of 1986 to extend the funding and expenditure authority of the Airport and Airway Trust Fund, to amend title 49, Untied States Code, to extend the airport improvement program, and for other purposes.

The question being on the passage of the bill; and

No amendment being proposed,

The bill was read the third time, by unanimous consent.

Resolved, That it pass.

A motion to reconsider was deemed made and laid on the table, by unanimous consent.

RECESS

Under the authority of the order of Tuesday, August 2, 2011,

At 10:00:59 a.m.,

The ACTING PRESIDENT pro tempore declared the Senate recessed, under its order of Tuesday, August 2, 2011, until 11 a.m., on Tuesday, August 9, 2011

. . .

Senate Journal, 112th Cong., 1st Sess. 917-923 (2011)

. . .

SATURDAY, DECEMBER 17, 2011

Mr. RICHARD BLUMENTHAL, from the State of Connecticut, called the Senate to order at 9 a.m., the Chaplain offered a prayer, and Mr. BLUMENTHAL led the Senate in reciting the Pledge of allegiance to the Flag of the United States of America.

. . .

ORDERS FOR ADJOURNMENT UNTIL 11 A.M. ON TUESDAY, DECEMBER 20, 2011, FOR PRO FORMA SESSIONS UNTIL 2 P.M. ON MONDAY, JANUARY 23, 2012, AND FOR PROGRAM

By unanimous consent, on the request of Mr. WYDEN,

Ordered, That, when the Senate concludes its business on today, it adjourn until 11 a.m. on Tuesday, December 20, 2011, for a pro forma session; that the Senate then adjourn until 9:30 a.m. on Friday, December 23, 2011, for a pro forma session; that the Senate then adjourn until 12 noon on Tuesday, December 27, 2011, for a pro forma session; that the Senate then adjourn until 11 a.m. on Friday, December 30, 2011, for a pro forma session; that the second session of the 112th Congress convene at 12 noon on Tuesday, January 3, 2012, for a pro forma session; that the Senate then adjourn until 11 a.m. on Tuesday, January 10, 2012, for a pro forma session; that the Senate then adjourn until 12 noon on Friday, January 13, 2012, for a pro forma session; that the Senate then adjourn until 10:15 a.m. on Tuesday, January 17, 2012, for a pro forma session; that the

Senate then adjourn until 2 p.m. on Friday, January 20, for a pro forma session; that no business be transacted on the aforementioned days; that the Senate then adjourn until 2 p.m. on Monday, January 23, 2012; that on Monday, January 23, 2012, immediately following the prayer and reciting of the Pledge of Allegiance to the Flag of the United States of America, the Journal of the proceedings of the Senate be approved to date, the morning hour be deemed expired, and the times for the two leaders be reserved; that the Senate then proceed to a period of one hour for the transaction of morning business until 4 p.m., with Senators permitted to speak for 10 minutes each therein, and that, following morning business, the Senate proceed to executive session, as pursuant to the order of today.

ADJOURNMENT

By unanimous consent, on the request of Mr. WYDEN,

At 3:33 p.m.,

The Senate adjourned, under its order of today, until 11 a.m. on Tuesday, December 20, 2011.

. . .

Senate Journal, 112th Cong., 1st Sess. 923-924 (2011)

. . .

FRIDAY, DECEMBER 23, 2011

Mr. MARK R. WARNER, from the Commonwealth of Virginia, called the Senate to order at 9:30:21 a.m., and

APPOINTMENT OF ACTING PRESIDENT PRO TEMPORE

The read the following communication from the PRESIDENT pro tempore:

U.S. SENATE
PRESIDENT PRO TEMPORE,
Washington, DC, December 23, 2011.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable MARK R. WARNER, a Senator from the Commonwealth of Virginia, to perform the duties of the Chair.

DANIEL K. INOUYE,
PRESIDENT pro tempore.

Mr. WARNER took the chair.

ORDER FOR RECOGNITION

By unanimous consent, on the request of Mr. REID,

Ordered, That he be recognized.

ORDER FOR CONSIDERATION OF CERTAIN LEGISLATION

By unanimous consent, on the request of Mr. REID,

Ordered, That when the Senate receives from the House of Representatives for concurrence a bill, relative to a two-month extension of reduced payroll tax, unemployment insurance, TANF, and Medicare payment fix, identical to the text at the desk, the bill be deemed read twice, considered, read the third time, and passed; and that a motion to reconsider be considered made and laid on the table.

MIDDLE CLASS TAX RELIEF AND JOB CREATION ACT

By unanimous consent, on the request of Mr. REID,

Ordered, That the Senate having received a message from the House of Representatives on the bill (H.R. 3630) to extend the payroll tax holiday, unemployment compensation, Medicare physician payment, provide for the consideration of the Keystone XL pipeline, and for other purposes on Tuesday, December 20, 2011, the Senate insist on its amendment, and agree to the conference asked by the House; and that the Chair be authorized to appoint conferees on the part of the Senate in a ratio of 4 majority- to 3 minority-party Senators.

ORDER FOR CONDITIONAL ACTION RELATIVE TO BILL H.R. 3630

By unanimous consent, on the request of Mr. REID,

Ordered, That, if the House does not pass, by January 1, 2012, said bill relative to a two-month extension, the aforementioned Senate action relative to bill H.R. 3630 be vitiated.

TEMPORARY PAYROLL TAX CUT CONTINUATION ACT

Subsequently, the bill (H.R. 3765) to extend the payroll tax holiday, unemployment compensation, Medicare physician payment, provide for the consideration of the Keystone XL pipeline, and for other purposes, having been received from the House of Representatives for concurrence, and being identical to text at the desk, was deemed read twice, considered, read the third time, and passed, as pursuant to the order of today.

ADJOURNMENT

Under the authority of the order of Saturday, December 17, 2011, as modified,

At 9:31:46 a.m.,

The ACTING PRESIDENT pro tempore declared the Senate adjourned, under its order of Saturday, December 17, 2011, until 12 noon on Tuesday, December 27, 2011.

. . .

Senate Journal, 112th Cong., 2d Sess. 1 (2012) (minute book)

Tuesday, January 3, 2012

Mr. Mark R. Warner, from the Commonwealth of Virginia, called the Senate to order at 12:01:32 p.m., and

The Legislative Clerk read the following communication from the PRESIDENT pro tempore:

U.S. Senate
PRESIDENT pro tempore,
Washington, DC, December 20, 2011.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable Mark R. Warner, a Senator from the Commonwealth of Virginia, to perform the duties of the Chair.

Daniel K. Inouye,
PRESIDENT pro tempore.

Mr. Warner took the chair.

Under the authority of the order of Saturday, December 17, 2011, as modified,

At 12:03:13 p.m.,

The ACTING PRESIDENT pro tempore declared the Senate adjourned, under its order of Saturday, De-

cember 17, 2011, until 11 a.m. on Friday, *January* 6, 2012.

Senate Journal, 112th Cong., 2d Sess. 2 (2012) (minute book)

Friday, January 6, 2012

Mr. Jim Webb, from the Commonwealth of Virginia, called the Senate to order at 11:00:03 a.m., and

The Assistant Bill Clerk read the following communication from the PRESIDENT pro tempore:

U.S. Senate
PRESIDENT pro tempore,
Washington, DC, January 6, 2012.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable Jim Webb, a Senator from the Commonwealth of Virginia, to perform the duties of the Chair.

Daniel K. Inouye,
PRESIDENT pro tempore.

Mr. Webb took the chair.

Under the authority of the order of Saturday, December 17, 2011,

At 11:00:32 a.m.,

The ACTING PRESIDENT pro tempore declared the Senate adjourned, under its order of Saturday, December 17, 2011, until 11 a.m. on Tuesday, January 10, 2012.

Senate Journal, 113th Cong., 1st Sess. 431 (2013) (minute book)

Sunday, October 13, 2013

Ms. Heidi Heitkamp, from the State of North Dakota, called the Senate to order at 1 p.m., the Chaplain offered a prayer, and Ms. Heitkamp led the Senate in reciting the Pledge of Allegiance to the Flag of the United States of America.

The Legislative Clerk read the following communication from the PRESIDENT pro tempore:

U.S. Senate
PRESIDENT pro tempore,
Washington, DC, October 13, 2013.

To the Senate:

Under the provisions of rule I, paragraph 3, of the Standing Rules of the Senate, I hereby appoint the Honorable Heidi Heitkamp, a Senator from the State of North Dakota, to perform the duties of the Chair.

Patrick J. Leahy,
PRESIDENT pro tempore.

Ms. Heitkamp took the chair.

Pursuant to the order of yesterday,

The Journal of the proceedings of the Senate was deemed approved to date.

Pursuant to the order of yesterday,

The morning hour being deemed expired, and the times for the recognition of the two leaders being reserved.

On motion by Mr. Reid that the Senate proceed to consider (cal. 211) the bill (S. 1569).

The question being on agreeing to the motion.

Pending debate,

By unanimous consent, on the request of Mr. REID,

Ordered, That, effective immediately, the Senate proceed to a period for the transaction of morning business, with Senators permitted to speak for 10 minutes each therein.

The Senate having convened following an adjournment,

The Presiding Officer (Ms. Klobuchar in the chair) laid before the Senate the joint resolution (H.J. Res. 76), received from the House of Representatives for concurrence on yesterday, and read the first time; which was read the second time.

Mr. REID objected to further proceedings on the joint resolution.

Whereupon,

The Presiding Officer stated that, pursuant to the provisions of rule XIV of the Standing Rules of the Senate, the joint resolution would be placed on the calendar.

By unanimous consent, on the request of Mr. REID,

Ordered, That, when the Senate concludes its business today, it adjourn until 2 p.m. on tomorrow; that, on tomorrow, immediately following the prayer and reciting of the Pledge of Allegiance to the Flag of the United States of America, the Journal of the proceedings of the Senate be approved to date, the morning hour be deemed expired, and the times for the two leaders be reserved; and that, at 5 p.m., the Senate proceed to executive session, as pursuant to the order of Saturday, October 5, 2013.

By unanimous consent, on the request of Mr. REID,

At 4:46 p.m.,

The Senate adjourned, under its order of today, until 2 p.m. tomorrow.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-1281

In The

Supreme Court of the United States

THE NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, a division of the Noel Corp., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENT NOEL CANNING

STEVEN J. LECHNER
Counsel of Record
JESSICA J. SPUHLER
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
jspuhler@mountainstateslegal.com

Attorneys for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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QUESTIONS PRESENTED

1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between enumerated sessions of the Senate.

2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

3. Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions.

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3(a), Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Respondent Noel Canning.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF's members include individuals who live and work in every State of the Nation. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system.

Central to the notion of a limited government is the constitutional principle of separation of powers.

[1] The parties have consented to the filing of this amicus curiae brief by filing blanket consents with the Court. *See* Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Indeed, "[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). Executive actions that negate the safeguards so painstakingly crafted by the Framers result in a federal government that is no longer limited and ethical, and further erodes individual liberty, the right to own and use property, and the free enterprise system. Therefore, MSLF respectfully submits this amicus curiae brief in support of Respondent Noel Canning, urging that this Court affirm the D.C. Circuit's ruling curtailing the politically-motivated abuse of the Recess Appointments Clause.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND.

A. The Recess Appointments Clause.

The Appointments Clause of the United States Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art. II, § 2, cl. 3. The Recess Appointments Clause

allows the President to make appointments when the Senate is in recess and thus unavailable to provide its advice and consent: "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 4.

B. The National Labor Relations Act.

The Labor Management Relations Act of 1947 created the National Labor Relations Board ("NLRB"), an independent federal agency meant to:

> [P]rotect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

29 U.S.C. § 141. The NLRB has been characterized as a "fact-finding tribunal with inquisitorial powers." *N.L.R.B. v. Bell Oil & Gas Co.*, 98 F.2d 870 (1938). It hears appeals from adjudicative decisions made by the many administrative law judges who resolve disputes between employers and employees. The National Labor Relations Act provides that the NLRB "shall consist of" five members, "appointed by the President by and with the advice and consent of the Senate." 29 U.S.C. § 153(a). The Act requires the

NLRB to have a quorum of three members in order to operate. 29 U.S.C. § 153(b).

II. PROCEDURAL BACKGROUND.

On December 17, 2011, the Senate was in session. It passed an adjournment order by unanimous consent and, from December 20, 2011 to January 20, 2012, met every three days in *pro forma* sessions. During these sessions, the Senate passed "a 2-month extension of the reduced payroll tax, unemployment insurance, TANF, and the Medicare payment fix[.]" 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011).

On January 4, 2012, during a three-day adjournment between *pro forma* sessions, the President invoked the Recess Appointments Clause in a putative effort to appoint Sharon Block, Terence Flynn, and Richard Griffin to the NLRB without the advice and consent of the Senate. *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 498 (D.C. Cir. 2013). The NLRB thus consisted of five members, three – Block, Flynn, and Griffin – who were purportedly legitimate recess appointees. *Id.*

In September of 2011, an NLRB administrative law judge issued an order against Noel Canning in a dispute between the Washington soft-drink bottler and Teamsters Local 760 ("the Union"). *Id.* at 494. The Union had alleged that Noel Canning had failed to acknowledge a properly executed collective bargaining agreement, and Noel Canning alleged that the agreement had never been finalized. *Id.* Noel

Canning appealed the administrative law judge's decision to the NLRB, and the NLRB, acting through a three-member panel, affirmed that decision. *Noel Canning, A Division of the Noel Corp.*, 358 N.L.R.B. No. 4, 2012 WL 402322 (Feb. 8, 2012). Noel Canning then appealed the NLRB's decision to the D.C. Circuit on both statutory and constitutional grounds. *Noel Canning*, 705 F.3d at 493.

Noel Canning's constitutional arguments alleged that because three of the board members had been illegitimately appointed, the NLRB lacked the quorum required by 29 U.S.C. § 153(b) and thus could not make legally binding decisions. *Id.* Noel Canning argued that NLRB members Block, Flynn, and Griffin were illegitimately appointed because: (1) they had been appointed during a Senate adjournment that was not a recess; and (2) their appointments filled vacancies that had not opened during the recess. *Id.* Therefore, the President did not have power under the Recess Appointments Clause to appoint any of them to the NLRB. *Id.* The D.C. Circuit held in favor of the NLRB on the statutory arguments and in favor of Noel Canning on the constitutional arguments. As to the constitutional question, the D.C. Circuit held that: (1) "the Recess" of the Senate, for purposes of the Recess Appointments Clause, is one between enumerated sessions of the Senate; and (2) a vacancy "happens" during the recess only when it first opens during the recess. *Id.* at 499. On April 25, 2013, the NLRB filed a petition for writ of certiorari. On May 23, 2013, Respondent

Noel Canning filed its response, but did not oppose the petition, due to the important constitutional issues at stake. On June 24, 2013, this Court granted the petition.

SUMMARY OF THE ARGUMENT

MSLF submits this amicus brief to emphasize the textual and historical absurdity of any departure from the D.C. Circuit's reasoning and ruling. The D.C. Circuit's decision in *Noel Canning* is consistent with the history and text of the Recess Appointments Clause. The modern purpose of the Recess Appointments Clause is also best served by the D.C. Circuit's interpretation of the clause. Petitioner's interpretation of the Recess Appointments Clause would render the clause a nullity, in violation of well-established constitutional jurisprudence. Such an interpretation would also eliminate basic procedural safeguards set forth in the Constitution in favor of political gamesmanship. Indeed, Petitioners explicitly point to political expediency as a reason to nullify the Recess Appointments Clause.

ARGUMENT

The D.C. Circuit correctly held: (1) that "the Recess" refers to an intersession of the Senate; and (2) that "may happen" refers to vacancies that first open during the recess of the Senate. *Noel Canning*,

705 F.3d at 499. The most natural reading of the Recess Appointments Clause supports the D.C. Circuit's holding. Moreover, the historical purpose of the Recess Appointments Clause supports the D.C. Circuit's holding.

I. THE RECESS APPOINTMENTS CLAUSE PLACES CLEAR TEMPORAL LIMITS ON PRESIDENTIAL POWER.

On its face, the Recess Appointments Clause is a narrow temporal exception to the general rule requiring the President to secure the Senate's advice and consent when making appointments. U.S. Const. art. II, § 2, cl. 4. The clause was meant to prevent government paralysis when the Senate was unavailable. More recently, however, it has been used as a political tool to avoid the advice and consent requirements of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. The D.C. Circuit's decision in *Noel Canning* interpreted the Recess Appointments Clause correctly, and as a result, limited the future improper use of the clause for political ends.

A. The Original Purpose Of The Recess Appointments Clause Was To Prevent Government Paralysis When The Senate Was Unavailable.

It is axiomatic that "the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention

is clear there is no room for construction and no excuse for interpolation or addition." *United States v. Sprague*, 282 U.S. 716, 731-32 (1931) (citations omitted). This Court has recognized that inquiries into the early interpretations of a legal text are "a critical tool of constitutional interpretation." *District of Columbia v. Heller*, 554 U.S. 570, 605 (2008). Early interpreters such as Alexander Hamilton, George Washington, and Thomas Jefferson were keenly aware of the political context in which the Constitution was drafted, and their interpretations are more likely than later interpretations to comport with the Constitution's original meaning. An examination of early interpretations shows that the Recess Appointments Clause was originally meant to ensure the government's smooth operation in the event of the Senate's unavailability, by allowing the President to temporarily replace an important officer. It was a practical solution to a practical – not political – problem.

When explaining the Constitution's requirement that the Senate advise and consent to the President's nominations of officials, Alexander Hamilton wrote that it "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters. . . ." FEDERALIST NO. 76, at 425 (Hamilton) (Clinton Rossiter ed., 1961). Hamilton viewed the possibility of senatorial disapproval of nominees as a "considerable and salutary restraint" on the President's power. *Id.* at 427. However, the Constitution's drafters recognized

that the Senate would be unavailable to provide their advice and consent for up to nine months out of the year, when the Senate was in its intersession recess. Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 380 (2005). Not only did the founding era's transportation and communication technology make it difficult to reconvene a recessed Senate, but the political theory of the time also held that it was "improper to oblige [the Senate] to be continually in session." FEDERALIST NO. 67, at 378 (Hamilton) (Clinton Rossiter ed., 1961). If the government were to run smoothly despite the opening of vacancies at times when the Senate was unavailable to provide its advice and consent, then the President's appointment power needed to be expanded during those times.

The Recess Appointments Clause, as Hamilton explained, provided the President not with a means of circumventing the advice and consent requirement, but rather with "an auxiliary method of appointment, *in cases to which the general method was inadequate*." *Id.* at 377 (emphasis added). Early Presidents' use of their recess appointment power demonstrates the function of the clause as a stopgap measure. When George Washington was faced with a vacancy late in the session of the Senate, he would use the advice and consent procedure to appoint a suitable candidate to the office before finding out whether or not he wanted the job. Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA

L. Rev. 1487, 1522 (2005). Then, if the appointee resigned from the office during the Senate's recess, Washington would fill it with a temporary recess appointment. *Id.* Washington's method of filling these appointments clearly showed a strong preference for the advice and consent procedure; recess appointments were used to fill offices only in the event that an appointee declined to serve.

Founding-era history is full of interpretations supportive of the D.C. Circuit's most recent holdings on the Recess Appointments Clause. As long ago as 1792, Attorney General Edmund Randolph (the first to hold the position), advised then-Secretary of Foreign Affairs Thomas Jefferson that the Recess Appointments Clause could not be used to appoint a candidate to the newly-created position of Chief Coiner of the Mint. T.J. HALSTEAD, CONG. RESEARCH SERV., RL33009, RECESS APPOINTMENTS: A LEGAL OVERVIEW 4 (2005) (citing Edmund Randolph, Opinion on Recess Appointments (July 7, 1792), in 24 The Papers of Thomas Jefferson, at 165-67 (John Catanzariti et al., ed., 1990); Hartnett, *supra*, at 384-86; Rappaport, *supra*, at 1518-19)). Randolph determined that the vacancy had "happened" or arisen, when the position was created, at which time the Senate was in session. *Id.* (citing Randolph at 166; Rappaport, *supra*, at 1519). Randolph based his opinion on much of the same reasoning put forth in 2013 by the D.C. Circuit, and noted that the Recess Appointments Clause "must be 'interpreted strictly' because it serves as 'an exception to the general

participation of the Senate.'" *Id.* Similarly, in 1799, then Major General of the Army Alexander Hamilton advised the Secretary of War that the "President cannot fill a vacancy which happens during a session of the Senate." *Id.*

Examination of early interpretations of the Constitution and early use of the Recess Appointments Clause clearly shows that the original purpose of the clause was to ensure that the government's smooth operation would not be interrupted by the Senate's unavailability to help the President replace an important officer.

B. The Modern Use Of The Recess Appointments Clause For Political Purposes Is Not Supported By The Text Or History Of The Clause.

Professor Rappaport writes that "as a matter of constitutional theory, the claim that we can trust the President to exercise a power only when it is needed is flatly inconsistent with the approach of the Constitution." Rappaport, *supra*, at 1542. Indeed, the Framers were adamant that their proposed tripartite government would succeed in large part because "its constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other." FEDERALIST NO. 51, at 290 (Madison) (Clinton Rossiter ed., Mentor 1999). It thus follows that every grant of power found in the Constitution has a dual function: at the same time as it serves to

provide the power to act, it also serves to limit the time, manner, or place where that power may be used.

The passing of centuries has not changed the basic function of the Recess Appointments Clause, but it has shown that Presidents can and will test the limits of when they may expand their appointment power. President Johnson was the first to make recess appointments under circumstances that suggest a purely political motive for expanding his appointment power; Rappaport notes that he made the appointments while he was "battling with the Republican Congress that impeached him," and that "[t]he disagreements between the President and Congress focused in part on appointments and personnel." Rappaport, *supra*, at 1487. Theodore Roosevelt's attempt to make 160 appointments during a seconds-long "constructive recess" was characteristic of the fondness for expanded executive power that he demonstrated throughout his presidency. *See* Hartnett, *supra*, at 416-17.

Although their context suggests that Johnson's and Roosevelt's recess appointments may have been politically motivated, President Carter seems to be "the first modern president to utilize the clause expressly to avoid the Senate's advice and consent." Michael A. Carrier, *When is the Senate in Recess for Purposes of the Recess Appointments Clause?*, 92 Mich. L. Rev. 2204, 2213 (2004). Carter wanted to put John McGarry on the Federal Election Commission despite the Senate's concerns about his financial

history and his ties to House Speaker Tip O'Neil. *Id.* at 2214 n.54. After the Senate refused twice to act on his nomination to the Commission, Carter used a recess appointment to secure McGarry's spot. *Id.* at 2214. Following Carter's lead, President Reagan also used his recess appointment power to circumvent the Senate's disapproval of numerous appointments to administrative agencies such as the Board of Governors of the Federal Reserve System, the Nuclear Regulatory Commission, and the National Council on the Humanities. *Id.* As Professor Carrier observes, Reagan's use of the recess appointments power "shaped executive agencies in ways that would have been difficult, if not impossible, if the President had allowed the Senate to play its normal constitutional role." *Id.* at 2216. This trend has continued; while in office Presidents George H.W. Bush, William Clinton, and George W. Bush all made recess appointments during intrasession recesses. Rappaport, *supra*, at 1548.

This overview of presidential limit-testing has illuminated a secondary purpose of the Recess Appointments Clause: it is necessary not only to provide the President appointment powers in times when he must unilaterally act in order to keep the government running smoothly, but also to limit those times when the President may unilaterally appoint an officer if no such exigency exists. While early interpreters of the Constitution understood that the Recess Appointments Clause was a means to keep the government running smoothly in case of the Senate's unavailability,

more modern interpreters clearly see the clause as a convenient shortcut to be used whenever the Senate appears to disapprove of a President's favored nominee. The "considerable and salutary restraint" on Presidential power contemplated by Hamilton has, in recent years, been made into a paper tiger which the President may brush away so long as he is willing to wait for the Senate to turn its back.

Meanwhile, as Presidential creativity regarding the Recess Appointments Clause has increased, so has the size and power of the administrative state. In the past century, executive agencies have expanded their control of American life to the point where they operate as a fourth branch of government. *See City of Arlington, Tex. v. F.C.C.*, 133 S.Ct. 1863 (2013) (Roberts, J., dissenting). They are given broad powers by Congress and broad discretion to interpret those powers by the Judiciary; the power of the Executive to appoint and remove their officers is one of the few means left to the government of controlling the inertia of the administrative state.

As Carrier pointed out in his discussion of Reagan's recess appointments, the power to appoint administrative officers is the power to shape a branch of government with an immense amount of control over American life. Carrier, *supra*, at 2215. It is doubtful that the Constitution is intended to allow the President to wield this vital authority with no input from Congress. The Founding Fathers were skeptical about granting too much appointment power to the President precisely because of the

importance of appointment authority in the eighteenth century. *Freytag v. C.I.R.*, 501 U.S. 868, 883 (1991) (noting that "[t]he manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism.") (internal citation and quotations omitted). It follows that their skepticism on unilateral Presidential appointment authority would be increased, rather than decreased, by the growth of the administrative state in the years since the Founding Era.

Furthermore, as time has built up the importance of the President's appointment power, it has worn away the necessity for a stopgap measure to keep the government running smoothly in the event of the Senate's unavailability. Today's technology has made communication and travel far easier, quicker, and less expensive than the Founders could have imagined. The Senate can be made aware of vacancies in government posts immediately after they open, and most Senators can be called from other business into the Capitol within a few days. This stands in stark contrast to the technological situation acknowledged by the Drafters in 1789, when the Senate would truly be unavailable and out of contact with the President for the majority of the year. Hartnett, *supra*, at 380.

When the Constitution was first drafted, the advice and consent requirement of the Appointments

Clause was considered a valuable check on Executive power. The Recess Appointments Clause was intended to keep the government running smoothly in the event of a vacancy happening while the Senate was unavailable. Advances in technology have made the Recess Appointments Clause less necessary as a practical matter. At the same time, Presidents have made increasing use of the Recess Appointments Clause to circumvent the advice and consent requirement. Thus, the need for expanded Presidential power has decreased at the same time as Presidents have become increasingly fond of expanding their power for purely political reasons. The D.C. Circuit's holding in *Noel Canning* appropriately recognized this dichotomy and interpreted the Recess Appointments Clause correctly: as a temporal limit on the President's appointment powers.

II. THE D.C. CIRCUIT CORRECTLY HELD THAT "THE RECESS" REFERS TO RECESSES BETWEEN ENUMERATED SESSIONS OF THE SENATE.

The D.C. Circuit held that "the Recess" refers not to the intrasession recesses which occur while the Senate is still in session, but rather to the intersession recesses which occur between sessions of the senate. *Noel Canning*, 705 F.3d at 500. The D.C. Circuit was correct in its holding, as well as in the observation that "[n]ot only logic and language, but also constitutional history supports [this] interpretation." *Id.*

A. The Text Of The Recess Appointments Clause Supports The Intersession Interpretation Of "The Recess".

Sound analysis of legal text begins with the text's plain meaning. *Heller*, 554 U.S. at 605-06. The most natural, grammatical reading of the Recess Appointments Clause clearly implies that "the Recess" of the Senate occurs only when the Senate is not in session. First, the Framers used a definite article – "the" – to modify "recess." Second, "the Recess" and "session" are juxtaposed in a way that makes it implausible to read "the Recess" as ever occurring at the same time as "session." Moreover, at the time the Constitution was drafted, the term "recess" had a technical meaning which supports the intersession interpretation.

The Framers used a definite article, referring to "the Recess." Definite articles are ordinarily used to refer to a singular object, such as "recess," as well as to demarcate an object from others which can be described by the same noun. MARK LESTER, GRAMMAR AND USAGE IN THE CLASSROOM 318 (2d ed. 2001). Reading the Recess Appointments Clause with this conventional rule in mind illustrates that the clause addresses not just any recess, but only one particular recess. This interpretation matches perfectly with the typical schedule of the Senate at the time that the Constitution was drafted: the Senate would meet for one session per year, which was followed by one intersession recess. Carrier, *supra*, at 2210. Furthermore, other uses of "recess" in the Constitution demonstrate that the definite article "the" distinguishes

"the Recess" as a singular event. As Carrier observes, Art. I, § 3.2 references vacancies which occur "during *the* Recess" of State legislatures, which generally had annual meetings and annual recesses. *Id.* at 2219.

Much has been made of the fact that another clause of the Constitution refers to "the absence of the Vice President." Hartnett, *supra*, at 414; Rappaport, *supra*, at 1567 n.225. The argument goes that because "the absence" does not refer to a specific absence of the Vice President, the Framers were using "the" and "a/an" interchangeably. Hartnett, *supra*, at 413-14. From there, proponents of the intrasession interpretation of "recess" go on to argue that "the" and "and" are used interchangeably throughout the Constitution, but this argument is flawed from its beginning. *Id.* "The absence of the Vice President" does *not* refer to just any absence of the Vice President, but rather to absences of the Vice President from the Senate which occur during the session of the Senate and therefore require the Senate to appoint a President *pro tempore* before conducting business. It is perfectly logical to use a definite article to refer to a particular kind of absence which occurs during a particular period of time and which triggers a particular event. The presence of a definite article in Article I is not a sound basis for an argument against the intersession interpretation.

Second, as the D.C. Circuit pointed out, there is a dichotomy between "the Recess" and "session" in the Constitution which strongly suggests that "the Recess" cannot take place within a session. *Noel Canning*, 705

F.3d at 500. The textual positioning of "the Recess" and "session" provides strong support for the court's finding that the Drafters created a dichotomy between those words. The full text of the clause shows this positioning: "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 4. Here, we see that the Drafters have created a parallel structure wherein the practical end of the clause (filling vacancies that arise during recesses) is separated from its means (granting commissions which expire at the end of the Senate's next session) by a comma. Both "the Recess" and "session" are included in adverbial phrases of time which limit the ends and the means of the clause, respectively. "The Recess" limits the time in which the ends of the clause are necessary; obviously, there would be no need for interim appointments were the Senate available to provide its advice and consent. Similarly, "session" puts a time limit on the means which may be used to accomplish the ends: the President cannot make permanent appointments to fill a recess vacancy, but may only appoint an officer to serve until the end of the next session. The distinct functions of the two phrases suggest that they have distinct meanings, and strongly support the D.C. Circuit's ruling that "[e]ither the Senate is in session, or it is in the recess." *Noel Canning*, 705 F.3d at 500.

Finally, the intersession interpretation is supported by historical evidence showing that "the Recess"

had a technical meaning in the political field. Rappaport discusses three types of legislative adjournments used by the English Parliament at the time of the Revolution: adjournments, prorogations, and recesses. Rappaport, *supra*, at 1550. Adjournments were short breaks and could be called by either house; prorogations were monarchically-ordered ends to a session (followed by a new session); and dissolutions ended Parliament and triggered elections after a monarchical order, the death of the monarch, or after a Parliament had lasted seven years. *Id.* at 1550-51. The Founders continued these mechanisms while expunging the role of the monarchs; thus, adjournments were expressly allowed by the adjournments clause, and dissolutions were engineered to occur every two years. *Id.* Prorogations, on the other hand, had to be restructured somewhat to eliminate the monarch's role. *Id.* The power to prorogue, Rappaport argues, was given to the houses, and prorogations were re-named "Recesses" in order to further bury the memory of monarchial rule in the language of republican government. *Id.* This history of the intersession recess shows that "the Recess of the Senate" does not refer to just any break in legislative proceedings, but rather to the democratic progeny of the monarchically-ordered prorogation.

Because the syntax, grammar, and textual history of the Recess Appointments Clause clearly support the intersession interpretation of "the Recess," the D.C. Circuit correctly held that "the Recess" refers to intersession recesses.

B. The Modern Purpose Of The Recess Appointments Clause Supports The Intersession Interpretation Of "The Recess."

As demonstrated above, it remains the primary purpose of the Recess Appointments Clause to place a temporal limit on the President's appointment power, even though its anti-paralytic purpose has taken a secondary role in the twenty-first century. Either purpose is served far better by the intersession interpretation of "the Recess" than the intrasession interpretation.

First, the anti-paralytic purpose is served well by a Recess Appointments Clause which only allows appointments during intersession recess. The Framers included the clause as a way to keep the government running during periods where the Senate was unavailable to provide its advice and consent on Presidential appointments. Today, the Senate is seldom unavailable as a practical matter; communication and transportation technology have advanced to the point where the President and Senate will be made aware of a vacancy's sudden opening by death or retirement within hours or even minutes of the occurrence. No serious argument can be advanced that limiting recess appointments to intersession recess will seriously impair the government's operation. Even in the unlikely event that an important vacancy opens and the Senate cannot be reconvened within a practical period of time, the President's existing power to make acting appointments is

adequate to keep the government running. Rappaport, *supra*, at 1562.

Second, the power-limiting function of the Recess Appointments Clause is better served by the intersession interpretation than the intrasession interpretation. By restricting the President's ability to unilaterally make appointments to times when the Senate is between sessions, the intersession interpretation of the Recess Appointments Clause ensures that the President cannot sit on controversial appointments until the next convenient intrasession recess. Neither can he peck away at the period of time that is commonly considered long enough to count as an appointment-worthy intrasession recess, as Presidents during the twentieth century have been very eager to do. *See* Rappaport, *supra* at 1548. The intrasession interpretation, on the other hand, provides Presidents with a plethora of opportunities to circumvent the Constitution's requirement that the Executive not unilaterally make appointments when the Senate is available to provide its advice and consent. The tendency of Presidents to use the Recess Appointments Clause for purely political purposes, combined with the decreased practical necessity for a stopgap measure to keep the government running in the event of Senatorial unavailability, demonstrate that the power-limiting function of the Recess Appointments Clause is better served by the intersession interpretation than the intrasession interpretation.

III. THE D.C. CIRCUIT CORRECTLY HELD THAT "MAY HAPPEN" REFERS TO VACANCIES THAT OPEN DURING THE RECESS.

The D.C. Circuit held that "happen" refers to vacancies that first arise during the recess of the Senate, rather than to vacancies which happen to exist when the Senate goes into recess. The Circuit Court correctly held that the "arise" interpretation of "happen" is correct, because (1) the text of the Recess Appointments Clause supports the "arise" interpretation, and (2) the modern primary purpose of the Recess Appointments Clause supports the "arise" interpretation.

A. The Text Of The Recess Appointments Clause Supports The "Arise" Interpretation Of "May Happen."

When analyzing an ambiguous textual provision, one should begin, as the D.C. Circuit did, "by looking to the natural meaning of the text as it would have been understood at the time of the ratification of the Constitution." *Noel Canning*, 705 F. 3d at 501 (citing *Heller*, 554 U.S. at 605-06); *see also Sprague*, 282 U.S. at 732; *Edwards v. Aguillard,* 482 U.S. 578, 594-95 (1987) (statutory interpretation requires inquiry into the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute. . . ."); *Crawford v. Washington*, 541 U.S. 36, 42-47 (2004) (surveying the common-law right of

confrontation at the time of the founding in conjunction with the text to interpret the Confrontation Clause). The most natural initial reading of "may happen" supports the "arise" interpretation; moreover, logic and grammar support that reading as well.

Founding-era dictionaries define happen as "to come by chance" and "to come without one's previous expectation." Rappaport, *supra*, at 1503. These definitions are consistent with the common usage of "happen" which has survived into the modern era. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 567 (11th ed. 2003). Although interpreters such as Hartnett argue that "happen" may be used to describe an event which is already occurring (e.g., the Vietnam War happened during the presidency of Richard Nixon, although it began earlier), this contention fails to account for the fact that different conjugations of "to happen" carry different meanings in the English language. *See* Hartnett, *supra* at 382 n.22. In fact, the Merriam-Webster Dictionary has separate entries for "happen" and "happening." The entry for "happen" offers five definitions which conform to the "arise" interpretation, and the two entries for "happening" offer definitions which conform to the "exist" interpretation. MERRIAM-WEBSTER COLLEGIATE DICTIONARY at 567. When something "happens," according to Merriam-Webster, it occurs by chance. *Id.* A "happening" or something that is "happening," on the other hand, "is particularly interesting, entertaining, or important" or "offer[s] much stimulating activity." *Id.* The various conjugations of "happen" may all originate from

the same infinitive, but they carry distinct meanings which should be noted in a thorough textual analysis.

The logic of the clause's sentence structure also supports the "arise" interpretation. Constitutional provisions should not be read in a way which makes any part of them superfluous. *Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("[i]t cannot be presumed that any clause in the constitution is intended to be without effect. . . ."). If the clause is interpreted to mean that "the President shall have power to fill up all Vacancies that may happen to exist during the recess," it becomes indistinguishable from a clause which states that "the President shall have power to fill up all vacancies during the recess." Professor Hartnett argues that this is not the case, and that "that may happen to exist during the Recess" is necessary language which restricts the President from filling future vacancies with recess appointments. Hartnett, *supra*, at 381 n.20. However, it is difficult to see why the Drafters would choose to restrict Presidents from filling future vacancies with recess appointments while leaving them free to fill already-existing vacancies. A recess appointment made to a future vacancy would, after all, be shorter in duration than a recess appointment to an existing vacancy. The office would become vacant during the next session of the Senate, and the recess appointment would last only until its end, whereas a recess appointment to fill an existing vacancy would last for the entirety of the Senate's next session. In both cases, as Hartnett himself observes, the President

and Senate would have ample time to perform their constitutional duty of nominating and confirming a new appointee to the vacancy before the end of the next session. Because there is no clear distinction between allowing the President to fill vacancies that existed before the recess and allowing him to fill vacancies that will not exist until after the recess, the "happen to exist" interpretation creates a superfluity. Because constitutional provisions should not be read in a way which renders any of their language superfluous, the "arise" interpretation is permissible while the "happen to exist" interpretation is not.

It has been further suggested that the "exist" interpretation does not necessarily create a superfluity, because it is unclear whether the prepositional phrase "during the Recess" modifies (1) "vacancies that happen" or (2) "shall have the power." *Id.* This suggestion is without merit. There are three types of prepositional phrases which are used according to the information the writer needs to convey: prepositional phrases of time, prepositional phrases of place, and prepositional phrases of manner. LESTER, *supra*, at 61. Throughout the Constitution, textual grants of power to a governmental authority are modified by prepositional phrases of manner (which often have a temporal and/or spatial element, but convey a broader range of information than prepositional phrases of time or place). *See* U.S. Const. art. II, § 1, cl. 2; art. III, § 3, cl. 2. Thus, when looking for a phrase which modifies "shall have the power," the most likely

candidate is a prepositional phrase denoting the manner in which the President shall use the power.

To say that the President shall have the Recess-Appointments power "during the Recess" is clearly out of line with the overall structure of textual grants of power within the Constitution, because that prepositional phrase of time does not convey the kind of information used elsewhere in the Constitution to modify textual grants of power. Rather, "shall have the power" is modified by a prepositional phrase of manner: "by granting Commissions which shall expire at the end of their next Session." U.S. Const. art. II, § 2, cl. 4. "During the Recess" clearly modifies "vacancies that happen." For the reasons described in the previous paragraph, an interpretation of the Recess Appointments Clause which essentially substitutes "happen to exist during the Recess" renders superfluous the phrase "vacancies that happen." Because of the presumption against superfluity, the "exist" interpretation of "happen" is impermissible.

Because the "exist" interpretation of "happen" is impermissible, and because the "arise" interpretation of "happen" is supported by the logic, grammar, and history of the Recess Appointments Clause's text, the D.C. Circuit correctly held that "happen" refers to vacancies which first open up during the recess of the Senate.

B. The Modern Primary Purpose Of The Recess Appointments Clause Supports The "Arise" Interpretation Of "May Happen."

The "arise" interpretation adequately performs the power-limiting function of the Recess Appointments Clause, and the "exist" interpretation fails to serve that function. The modern primary purpose of the Recess Appointments Clause is to restrict the President from unilaterally appointing officers unless it is necessary to do so in order to keep the government running smoothly. The centuries that have passed since the Constitution's ratification have brought both technological advances and an increase in Presidential use of the Recess Appointments Clause for purely political purposes; as the need for the Recess Appointments Clause as an anti-paralytic tool has decreased, the need for the Recess Appointments Clause as a restraint on unilateral Executive action has increased.

The "arise" interpretation clearly limits the President's ability to unilaterally appoint officers on those occasions when a vacancy first opens up during a recess of the Senate. In such a situation, the Senate is unavailable to provide its advice and consent, and the President must expand his appointment power to keep the government running smoothly. This necessity was recognized by the Drafters, and it is the reason that the Recess Appointments Clause was included in the Constitution. The "arise" interpretation of "may happen" not only allows the President to unilaterally

make appointments in times of need, but also constrains his ability to use that power to those times of need. Under this interpretation, he may not sit on contentious appointments until the Senate has gone into recess; instead, he must work with the Senate, which is able to use its advice and consent as the "considerable and salutary restraint" on the President's power envisioned by Hamilton. The "arise" interpretation is thus sufficient to perform the power-limiting function of the Recess Appointments Clause as well as its anti-paralytic function.

The "exist" interpretation, on the other hand, is unnecessary for the clause's anti-paralytic function and fails completely to perform its power-limiting function. It may be argued that the Drafters must have intended to allow the President to fill any vacancy that might happen to be open at the time the Senate goes into recess, because news of a vacancy that opened during the Senate's session might not have reached Washington until the recess. Developments in communication and transportation technology have weakened this argument. In the age of the smart phone and the Twitter feed, news literally travels at light speed; the President will have ample opportunity to present a nominee to the Senate for its advice and consent even if a vacancy opens close to the end of the session. Should the Senate be unable to confirm a nominee in time, Congress still retains its power to make acting appointments to keep the government running smoothly. Rappaport, *supra*, at 1513-17 ("[u]nder acting appointments, Congress

permits the occupant of one office to perform the duties of a second office when that second office is vacant . . . acting appointments offer an extremely flexible mechanism for addressing the problems of late session vacancies or any vacancies that would take a long time to fill. Yet, these appointments fully respect the senatorial consent provision, because they both require all of the officials who act as superior officers to have secured senatorial consent and also allow Congress to restrain acting appointments should it believe the President has abused his authority."). The "exist" interpretation is thus unnecessary for the Recess Appointments Clause to fulfill its anti-paralytic function; at the same time, it fails to perform its power-limiting function. As described above, a President attempting to cooperate with a contentious Congress would neither need to compromise nor settle his differences with the Senate as the Drafters envisioned. Rather, he may override the Senate's advice and consent by simply waiting until the next convenient recess to secure the nominee he desires.

Not only does the text of the Recess Appointments Clause strongly support the "arise" interpretation of "may happen" through grammar and logic, but the original and modern purposes of the clause also support this interpretation. The "arise" interpretation is the natural and logical reading of "may happen," and the "arise" interpretation is necessary and sufficient to fulfill both the anti-paralytic and power-limiting functions of the Recess Appointments Clause. For these reasons, as well as the numerous strong

arguments against the "exist" interpretation, the D.C. Circuit correctly held that "may happen" should be interpreted to mean "arise."

CONCLUSION

For the foregoing reasons, this Court should affirm the D.C. Circuit's holdings (1) that the President may only make recess appointments during intersession recesses, and (2) that the President may only make recess appointments to fill vacancies that first opened during a recess of the Senate.

Respectfully submitted,

STEVEN J. LECHNER
Counsel of Record
JESSICA J. SPUHLER
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
jspuhler@mountainstateslegal.com

Attorneys for Amicus Curiae

AMICUS CURIAE BRIEF

No. 12-1281

In The Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENTS

JUSTIN F. KEITH
GREENBERG TRAURIG, LLP
One International Place
Boston, MA 02110
(617) 310-6230

KAREN R. HARNED
ELIZABETH MILITO
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 314-2061

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
GREENBERG TRAURIG, LLP
2101 L Street, N.W.
Washington, DC 20037
(202) 533-2361
Solomonsm@gtlaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS CURIAE*[1]

The National Federation of Independent Business ("NFIB") is the nation's leading small business association, representing 350,000 member businesses in Washington, D.C., and all fifty state capitals. Founded in 1943, as a nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB's Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses.

NFIB's membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs ten people and reports gross sales of about $500,000 a year. The

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[1] All parties to this matter have granted blanket consent for *amicus curiae* briefs in support of either or neither party. The respondent/intervenor below, National Brotherhood of Teamsters Local 760, filed such consent on September 3, 2013. The petitioner, National Labor Relations Board, filed such consent on September 12, 2013, and the respondent, Noel Canning, filed such consent on November 12, 2013. The requirements of Rule 37.2(a) of the rules of this court are satisfied by these filings.

In accordance with Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

This case presents questions to this Court that are of critical importance to the small business community.

INTRODUCTION AND SUMMARY OF ARGUMENT

The NFIB Legal Center urges this Court to affirm the decision of the United States Court of Appeals for the District of Columbia Circuit in this case. This *amicus* further urges this Court to hold that the President lacks constitutional authority to exercise the recess appointment power set forth in U.S. Const. art. II, § 2, cl. 3 while the Senate is convening for three days at a time in *pro forma* sessions.

This brief *amicus curiae* addresses the matters that are of paramount concern to the small business community. Three inquiries in particular raise special concerns for this community and the views of this *amicus* are presented here to assist the Court in addressing these matters.

First, there is today almost universal recognition of the fact that the small business community is the principal engine of job creation in the United States and the place where innovation and invention are

most robust. We believe there is no parallel anywhere matching the vitality, productivity and potential of U.S. small business.

We believe also that our Constitutional system of governing, and in particular, our separation of powers doctrine, plays a large role in empowering the vitality of small businesses in the United States. When this system erodes or functions less perfectly, there is an adverse impact on the ability of small businesses to have the significant impact they should have on the national marketplace and the economy as a whole.

Empirical studies in recent years conducted by NFIB affiliates and others document this effect and caution that there may be a heavy price to pay not only for owners and supporters of small business, but the nation as a whole when institutional values deteriorate.

This *amicus* believes that the values reflected in our Constitution are the same values that empower our small business community. NFIB Legal Center asks the Court to consider these factors as a guide in the disposition of this case.

Second, the opinion of the D.C. Circuit in the decision below, *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), reflects a meticulous analysis of the text and historical context of the recess appointment clause, U.S. Const. art. II, § 2, cl. 3, and related constitutional provisions. There is no need for this *amicus* to cover the same ground that has been explored by so many others.

A point of greater significance to the NFIB Legal Center is that while the plain language may stimulate controversy, although we do not believe it should, our core principles of separation of powers doctrine and their enforcement through constitutional checks and balances should end the debate. It should also resolve any perceived ambiguity over the intentions of the Framers in selecting the words that comprise the Recess Appointments Clause, and the provisions of the Constitution that interact with it.

This system is the "foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). The system also is designed to establish and preserve a stable society that is assisted in its individual and collective pursuit of liberty by a balanced and stable government. In a practical sense, the allocation of co-equal power to the branches of government enables society to thrive and that benefit inures to the small business community as well as society as a whole.

The unprecedented actions of the President on January 4, 2012, during the *pro forma* sessions of the Senate making executive appointments to important positions in the government was not what the Framers had in mind for the government they envisioned. Whatever frustrations may be a part of political life today, the Framers did not create a network of loopholes for the expedient elimination of the Constitutional role of the Senate in the appointments process.

Where political disputes are not resolved within the constitutional framework, the stability and certainty of our society is damaged and that in turn has had significant adverse consequences for the health of the small business community. The empirical data collected in recent years leave little doubt that this effect is occurring and that this Court should step in to restore constitutional order.

The third and final question addressed here arises from a concern that the failure of Noel Canning to challenge the authority of the recess appointees while the case was before the National Labor Relations Board ("NLRB") may cast doubt on this Court's willingness to resolve the case on its merits. *See* 29 U.S.C. § 160(e); *NLRB v. RELCO Locomotives, Inc.*, Nos. 12-2111, 12-2203, 12-2447, 12-2503 (8th Cir. Aug. 20, 2013). The waiver provision merits brief mention here because it raises concerns that are common among small business litigants who may be less familiar with the complexities of federal agency proceedings.

In this case, the waiver argument is itself waived, not having been raised by any party in this Court. Neither does the point have any sensible application in a case like this where clairvoyance would have been a necessity on the part of Noel Canning. Objections were initially filed nine months before the January 4, 2012 recess appointments were made. Under well-established law, the futility rule also should have taken the waiver issue out of the case.

ARGUMENT

I. A Rule of Constitutional Doctrine that Sacrifices Core Principles for Expedience Damages the Vitality of Small Business

The relationships between government, especially the Federal government, and the business community are increasingly important factors in the success or failure of business enterprises. These relationships often present special challenges to the small business community which is often most sensitive to change and vulnerable to the effects of disruption and instability in the government sector. *See* Mark E. Schwertzer and Scott Shane, "Economic Policy Uncertainty and Small Business Exposure," Federal Reserve Bank of Cleveland, available at http://www.clevelandfed.org/research/commentary/2011/2011-24.cfm; Majar L. Clark III, *et al.*, "The Role of Small Business in Economic Development of the United States: From the End of the Korean War (1953) to the Present," Office of Advocacy, Small Business Administration (September 2010), available at http://www.sba.gov/advocacy/7540/12143.

Neither is the small business sector small. In May 2012, Forbes Magazine reported that at any given time, there are from 25-27 million small businesses that account for 60-80% of all private sector jobs in the United States. The same report noted that small businesses produce 13 times more patents than big businesses. *See* Rebecca O. Bagley, "Small Business = Big Impact," Forbes Magazine (May 2012), available

at http://www.forbes.com/sites/rebeccabagley/2012/05/15/small-businesses-big-impact/.

There are, of course, many ways in which government dysfunction and the uncertainty it breeds may adversely affect small businesses. Regulatory confusion, overly complex or temporary statutory obligations and a general lack of focus on the small business sector all present potentially significant hurdles. There is no doubt that where a particular regulator, like the NLRB, becomes dysfunctional because of political discord in the appointment process, the businesses that are affected have reason for concern. They are unable to move beyond the relevant labor issues and get on with business. This concern translates into uncertainty and is likely to disrupt plans, promote unnecessarily conservative business practices and, for certain individual companies, may be life threatening.

The overall impact of the various forms of government instability on small business is well documented and not surprising. Nearly 70% of small businesses say that federal government policies and conduct "are hurting small businesses". Greg Bianco, "Survey: Small Business Scared to Expand Because of Government Uncertainty," Bizjournals (September 25, 2012), available at http://www.bizjournals.com/washington/news/2012/09/25/survey-small-businesses-scared-to.html. Explaining the findings of the survey, co-sponsored by NFIB and the National Association of Manufacturers, NAM's CEO, Jay Timmons, commented: "The findings of this survey show that manufacturers and

other small businesses have a starkly negative outlook for their future – with good reason. . . . There is far too much uncertainty, too many burdensome regulations and too few policymakers willing to put aside their egos and fulfill their responsibilities to the American people". *Id.* *See also* NFIB and NAM, "Summary of Findings NFIB and NAM Survey of 800 Small Business Owners, Manufacturers, and Owners or C-Level Decision Makers, August 13-September 4, 2012," available at http://pos.org/2012/09/nfib-and-nam-survey-of-small-businesses-and-manufacturers/.

Studies over the last decade culminating in a 2012 investigation by NFIB's Research Foundation confirm that the extraordinarily high degree of concern over government dysfunction causes significant adverse consequence for hiring, investment, innovation and growth. While no one activity is singled out as a principal culprit, an overall sense of failing or floundering institutions is changing the behavior of the small business community, and not for the better. *See* Holly Wade, "Small Business Problems and Priorities," NFIB Research Foundation, available at http://www.nfib.com/pnp2012; *see also* U.S. Chamber of Commerce, "Prolonged Uncertainty Impacting Small Business Ability to Create Jobs" (October 3, 2012), available at http://www.uschamber.com/press/releases/2012/October/prolonged-uncertainty-impacting.

There is little, if any, reporting to the contrary and the prospects for a more favorable environment are elusive.

The Constitution should not be interpreted to advance political dysfunction and it was neither drafted nor intended to accommodate the current *status quo*. The Framers had an opposite purpose.

II. The Separation of Powers Doctrine Should Be Enforced in this Case to Prohibit the Usurpation of Senatorial Powers By the President

The system of government established by our Constitution was not intended to be and is not a game for clever players. The Constitution both grants and limits the powers it defines. The Framers intended to build a system that would provide no fertile ground for the tyranny of the despotic systems that prevailed elsewhere. *See Freytag v. Comm'r*, 501 U.S. 868, 883-84 (1991); *Bowsher*, 470 U.S. at 730.

In addressing the power of the President to select subordinate executives for the new government, the Framers were clear enough in their intent to distinguish the powers of the President to nominate for high office from the power of the Senate to confirm the president's choices. The discussion in THE FEDERALIST Nos. 76 and 77 (Henry Cabot Lodge ed. 1889) on the Appointments Clause reveals the intent of the Framers to create a smooth and rational process that would enhance the prospects for the selection of qualified and properly credentialed executives whose performance in office would satisfy both the President and the Senate and complement the functioning of

both institutions. *Id.* ("The true test of good government is its aptitude and tendency to produce a good administration. . . . It is not easy to conceive a plan better calculated than this to promote a judicious choice of men for filling the offices of the Union; and it will not need proof that on this power must essentially deepen the character of its administration."). *See also id.* at 473, 475; *id.*, No. LXXVII at 477, 479.

These prescriptions do not include, and by their apparent intent, prohibit maneuvers to diminish or downgrade the power of either institution in the appointment process. They call for strict obedience to the words ultimately selected by the Framers and those words and that intent caution that the conduct this Court is reviewing in this case is not what the Framers had in mind. The legal conclusion the Executive Branch is seeking would diminish the power of one branch to suit the objectives of the other, overriding the longstanding rules of the Senate. It assumes also that the appointment, even temporarily, of candidates that are not acceptable to one branch should serve anyway because the other prefers it that way. In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), this Court held:

> But the doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls

> and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.

Plaut, 514 U.S. at 239.

The principles discussed caution against an expansive or creative interpretation of the text of the Recess Appointments Clause. Although it may be desirable to fill important jobs that happen to be vacant, it serves no good purpose to fill them notwithstanding Constitutional limitations.

Neither the small business community nor the country as a whole is well-served by appointments that are made in derogation of the Constitutional requirements. These appointments, contentious as they are, do not advance the seeking of middle ground that promotes predictability and certainty in the governing of regulated businesses. Since all partisan advocates may always seek the advantage of diminishing the power of their adversaries, such a practice ensures dysfunction well beyond the outcome or the government's objective in this case.

For all of these reasons, an outcome that causes significant unbalancing of our system of checks and balances and separation of powers is a bad outcome for the small business community.

III. The Court Below Properly Held that the Issues Presented Before this Court Were Not Waived

In *NLRB v. RELCO Locomotives, Inc.*, Nos. 12-2111, 12-2203, 12-2447, 12-2503 (8th Cir. Aug. 20, 2013), the Eighth Circuit found that the petitioner waived its challenge to the Board's composition because it did not raise the issue before the deficient Board itself. That finding poses no impediment to consideration of this case for three reasons.

First, reading 29 U.S.C. § 160(e) as a jurisdictional bar contravenes the presumption that judicial review is available for constitutional claims.[2] *See Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("[W]hen constitutional questions are in issue, the availability of judicial review is presumed.") (*citing Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Weinberger v. Salfi*, 422 U.S. 749 (1975)). Because "[c]onstitutional questions . . . are unsuited to resolution in administrative hearing procedures, . . . access to the courts is essential to the decision of such questions." *Califano*, 430 U.S. at 109. Accordingly, statutes will not be construed "to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence." *Id.*

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[2] Section 10(e) of the Act provides in relevant part that: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e).

Here, reading section 160(e) as a jurisdictional or prudential bar to challenging the constitutionality of these recess appointments would do just that. It would impermissibly "close[ ] the federal forum to the adjudication of colorable constitutional claims." *Id.*

Second, in addition to impermissibly foreclosing review of an important constitutional question, such a reading of section 160(e) asks parties to predict that a constitutional claim might arise and then raise it before an agency that cannot and will not resolve it. The law imposes no such duty of clairvoyance.

Asking litigants to predict that the Board may lose its quorum or become populated with invalidly appointed Members while their cases are pending overlooks that cases can remain pending at the Board for years before a decision issues. At the time an appeal is filed with the Board, there is no way to know which "Board" will actually decide the case. *See e.g. Northeastern Land Servs., Ltd. v. NLRB*, 560 F.3d 36 (1st Cir. 2009) (exceptions to ALJ decision filed in 2002, Board decision issued on June 27, 2008).

Requiring litigants to raise constitutional claims before an agency also contravenes the rule that agencies generally cannot resolve constitutional claims. *Spiegel, Inc. v. F.T.C.*, 540 F.2d 287, 294 (7th Cir. 1976) ("Generally, federal administrative agencies are without power or expertise to pass upon the constitutionality of administrative action.").

Finally, even if it could decide the constitutional issue, the Board refuses to decide challenges to the

validity of its Members' appointments. *See Center for Social Change, Inc.*, 358 NLRB No. 24 (2012) ("Historically, the Board has declined to determine the merits of claims attacking the validity of Presidential appointments to positions involved in the administration of the Act.").

Third, the *RELCO* decision ignores that asking the invalidly appointed Board to refrain from deciding the case would have been futile in light of the Board's public statements and actions since the D.C. Circuit issued the decision in *Noel Canning*.

The day that *Noel Canning* was decided, the Chairman of the NLRB issued a statement expressing disagreement with the decision and stating that the Board "will continue to perform our statutory duties and issue decisions." *Statement by Chairman Pearce on recess appointment ruling*, dated January 25, 2013.[3] True to these words, the Board has treated the *Noel Canning* decision as a legal non-event. Shortly after *Noel Canning* was decided, the Board denied a motion to dismiss an unfair labor practice complaint based on the holding of that case. *See Bloomingdale's, Inc.*, 359 NLRB No. 113 (2013). Since then, the Board has rejected challenges to its composition at every turn. *See, e.g., H&M Int'l Transp., Inc.*, No. 22-CA-095095 (May 20, 2013) (rejecting *Noel Canning* challenge to Board-issued subpoena "[f]or

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[3] Available at http://www.nlrb.gov/news-outreach/news-story/statement-chairman-pearce-recess-appointment-ruling.

the reasons stated in *Bloomingdale's, Inc.*"); *Hyundai Power Transformers USA*, No. 15-CA-095044 (2012) (denying motion to dismiss "[f]or the reasons stated in *Bloomingdale's, Inc.*"). The government has not identified a single reported decision where the Board has adhered to the D.C. Circuit's decision in *Noel Canning*. In light of the Board's words and actions, asking it to adhere to *Noel Canning* would be futile. *See W&M Properties of Connecticut, Inc. v. NLRB*, 514 F.3d 1341, 1346 (D.C. Cir. 2008) (noting that "extraordinary circumstances" may exist where an "agency had already rejected [petitioner's] contested argument in other proceedings."). Futility of this type is a recognized exception to the waiver provision of section 160(e).

Here, the D.C. Circuit found that extraordinary circumstances justified a waiver and no party has challenged that finding. The waiver argument is thus itself waived and that too disposes of any perceived jurisdictional or other impediment to reaching the merits of the constitutional challenge.

CONCLUSION

The decision of the United States Court of Appeals for the D.C. Circuit should be affirmed.

Respectfully submitted,

JUSTIN F. KEITH
GREENBERG TRAURIG, LLP
One International Place
Boston, MA 02110
(617) 310-6230

KAREN R. HARNED
ELIZABETH MILITO
NFIB SMALL BUSINESS
LEGAL CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 314-2061

MARK E. SOLOMONS
Counsel of Record
LAURA METCOFF KLAUS
GREENBERG TRAURIG, LLP
2101 L Street, N.W.
Washington, DC 20037
(202) 533-2361
Solomonsm@gtlaw.com

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

NOV 2 5 2013

No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NOEL CANNING,
A DIVISION OF THE NOEL CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC. AND JEANETTE GEARY IN SUPPORT OF RESPONDENT

GLENN M. TAUBMAN
JOHN N. RAUDABAUGH
NATIONAL RIGHT TO WORK
LEGAL DEFENSE
AND EDUCATION
FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
gmt@nrtw.org
jnr@nrtw.org

THOMAS H. ODOM
Counsel of Record
PRINCE LAW OFFICES, P.C.
646 Lenape Road
Bechtelsville, PA 19505
(888) 313-0416
todom@princelaw.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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QUESTIONS PRESENTED

With respect to principal officers of the United States, the Appointments Clause of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art. II, § 2, cl. 2. As an exception to that provision, the Recess Appointments Clause of the Constitution provides that "[t]he President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. The questions presented are:

1. Was the exception to the general provision for appointment of principal officers during the recess of the Senate properly exercised during a period governed by the same Senate scheduling order under which the President previously sought and obtained official, collective action of the Senate?

2. May the exception to the general provision for appointment of principal officers during the recess of the Senate be exercised during a recess that occurs within a session of the Senate, or is it instead limited to the recess that occurs between sessions of the Senate?

3. May the exception to the general provision for appointment of principal officers during the recess of the Senate be exercised to fill vacancies that arise prior to the recess, or is it instead limited to vacancies that first arise during that recess?

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus National Right to Work Legal Defense and Education Foundation, Inc. ("Foundation") is a charitable, legal aid organization formed to protect the Right to Work, the freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. Through its staff attorneys, the Foundation aids employees who have been denied or coerced in the exercise of their right to refrain from collective activity. The Foundation's staff attorneys have served as counsel to individual employees in many cases involving employees' right to refrain from joining or supporting labor organizations, and thereby have helped to establish important precedents protecting employee rights in the workplace against the abuses of compulsory unionism. These cases include *Knox v. Service Employees International Union*, Local 1000, 132 S. Ct. 2277 (2012); *Davenport v. Washington Education Ass'n*, 551 U.S. 177 (2007); *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

The Foundation's legal aid program supports cases arising under the National Labor Relations Act, 29

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), *amici* state that letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

U.S.C. § 151 *et seq*. Since January 2012, numerous Foundation-assisted employees have had their cases decided by the NLRB Members whose recess appointments are being challenged in this case. Those cases include *Richards v. NLRB*, 702 F.3d 1010 (7th Cir. 2012); *Smith's Food & Drug Centers, Inc.*, 358 N.L.R.B. No. 66 (July 10, 2012), *petition for review filed*, No. 12-1338 (D.C. Cir. Aug. 1, 2012); *United Nurses & Allied Professionals*, 359 N.L.R.B. No. 42 (Dec. 14, 2012), *petition for writ of mandamus voluntarily dismissed sub nom. In re Jeanette Geary*, No. 13-1029 (D.C. Cir. Aug. 9, 2013); *Communications Workers of America*, 359 N.L.R.B. No. 131 (June 10, 2013). For this reason, the Foundation has an interest in a resolution of this case in which the recess appointments are held unconstitutional and the decisions of the recess appointees declared null and void.

Amicus Jeanette Geary is a registered nurse who filed the unfair labor practice charge in *United Nurses & Allied Professionals*, 359 N.L.R.B. No. 42 (Dec. 14, 2012) (3-1 decision), raising claims under this Court's decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988). The outcome of her pending case will be directly affected by this case's resolution, because one of her claims was determined by a Board that had only two Senate-confirmed Members. In addition to challenging the recess appointments within the NLRB's adjudicatory process, Ms. Geary filed a Petition for Writ of Mandamus to stop the NLRB from ruling on the remaining issues in her case in the absence of a valid quorum of Members. *In re Jeanette Geary*, No. 13-1029 (D.C. Cir.).[2] Ms. Geary here seeks

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[2] Ms. Geary's mandamus petition was voluntarily dismissed as moot upon Senate confirmation of a valid quorum of NLRB Members in July 2013.

to ensure that only a constitutionally valid NLRB will have determined her claims.

SUMMARY OF ARGUMENT

Much of the briefing in this case illustrates the adage about not seeing the forest for the trees. The exhaustive, competing analyses of text and historical practice obscure a few basic truths that may assist in framing the issues before the Court in a way that does justice to the Constitution's structure. *First*, a single Senate scheduling order covered the entire period in which the President[3] successfully called upon the Senate to take official, collective action with respect to legislation, though he now claims the Senate was unavailable during that same period. *Second*, the Constitution's recess appointment provision is an exception from the general rule governing appointments; it is not a power isolated from the general rule. *Third*, under the test articulated throughout the President's brief, it is evident that the Senate was, in fact, available for official, collective action at all relevant times, and that modern technology ensures that it is almost always available for such action.

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[3] Although it is common for the Solicitor General to refer to his brief as that of "the Government," due to the separation of powers issues that have prompted Members of Congress to file briefs in this case, for sake of clarity his brief and the positions he takes are attributed to "the President."

ARGUMENT

I. THE PRESIDENT SIMULTANEOUSLY ASSERTS MUTUALLY INCONSISTENT POSITIONS WITH RESPECT TO WHETHER THE SENATE WAS IN RECESS

There is a narrow basis on which the Court can resolve this case without wading into deeper constitutional waters. The Senate's unanimous consent order of December 17, 2011, which governed the entire period from that date through January 23, 2012, Pet. App. 91a-92a, drew no distinction between *pro forma* sessions scheduled before or after noon, January 3, 2012. After the Senate adopted that consent order, while many of its members were geographically dispersed, the President expressly called upon the Senate to act in its official, collective capacity to enact legislation during the period covered by the order. Not only did the Senate act, the President signed the resulting bill during the period covered by the Senate's order. Pet. Br. at 52 n.49. Based on that actual official, collective action, it was no mere "remote possibility," *id.* at 52, that the Senate could act on business prior to January 23, 2012 – it was historical fact.

Inconsistently, during the same period covered by the Senate's order, the President posited that the Senate was unavailable to act in its official, collective capacity and, as a consequence, he had the authority to unilaterally appoint principal officers of the United States. The traditional judicial tool of estoppel provides a basis to hold that, having benefitted from one characterization of the situation (enactment of requested legislation), the President may not now demand a conflicting characterization. Such a holding

would signal both to the President and the Senate (as well as the electorate) that there are judicially enforceable limits to the power to make recess appointments, without necessitating a broad articulation of those limits in this case.

Addressing more broadly on the merits the issue of when the Senate is in recess on the facts presented here can only entangle the Court in having to decide related disputes – *e.g.*, the minimum number of days that constitute a sufficient recess of the Senate for purposes of the recess appointment exception, the validity of *pro forma* sessions in calculating that length of time, whether Sundays should be counted as other days in calculating the length of the recess, and whether the Senate could constitutionally recess without the consent of the House of Representatives. The President asserts that the last of those items would constitute a mere intra-branch dispute that the Court need not resolve. However, where, as here, the House does not consent to an adjournment by the Senate precisely to ensure that the President obtains Senate approval of any nominees, Pet. Br. at 56, the dispute no longer involves only the two houses of Congress.[4]

The President concedes that "the advice-and-consent process engages political leaders in a long

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[4] Contrary to the President's suggestion, Pet. Br. at 56 n.55, the House of Representatives' objection to Senate adjournment was not designed to provide a role for itself in the appointment process. The House merely sought to ensure that any presidential nominees would be subject to the moderating influence *of the Senate*. If this Court were to determine that the House acted improperly in preventing the Senate from adjourning, the Court would become enmeshed in determining which future disagreements over adjournment are for proper reasons and which are not.

course of repeated interactions, in which short-term compromises can be made despite disagreements." *Id.* at 57-58 (footnote omitted). That acknowledgment undermines much of the President's brief. Under that explanation, it does not matter how many past Presidents made any number of recess appointments under whatever circumstances. Situations where an appointment drew no objections because the appointee was qualified and noncontroversial, or because the particular office and circumstances illustrated an unquestionable emergency, or because any Senate objection was ameliorated by political compromise on other matters, do nothing to resolve the deeper "disagreements" over the scope of the recess appointment exception.

II. THE RECESS APPOINTMENT PROVISION IS AN EXCEPTION TO THE GENERAL RULE GOVERNING APPOINTMENT OF PRINCIPAL OFFICERS

The President argues over the meaning of the recess appointment "power" as though it exists in a vacuum, ignoring the Constitution's establishment of a single, general rule for the appointment of principal officers to which the provision for recess appointments constitutes an *exception*.[5] This Court's "standard approach"

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[5] With respect to *inferior* officers, the Constitution permits additional exceptions from the general, default method of appointment. For those officers, Congress may authorize the President to make unilateral appointments. That the Constitution does not permit Congress to vest unilateral appointment power in the President for principal officers further underscores that, as a general matter, the Constitution requires Senate approval, with the recess appointment provision constituting only an exception.

is to construe exceptions narrowly so as to not undermine a general rule. *Commissioner v. Clark*, 489 U.S. 726, 739 (1989); *see also Bernal v. Fainter*, 467 U.S. 216, 222 n.7 (1984) (citing *Nyquist v. Maculet*, 432 U.S. 1, 11 (1977)) (narrowly construing political function exception to bar discrimination on the basis of alienage). Here, in an effort to avoid rendering the general rule entirely meaningless, the President concedes that the recess appointment power does not extend to *future* vacancies that do not exist at the time of the putative appointment. Pet. Br. at 31. The very fact that the President requires such an absurd example to illustrate that any meaning remains to the general rule demonstrates the over-breadth of his reading of a mere *exception* to the general rule.

The President also acknowledges that some breaks in Senate business are too brief to permit use of the recess appointment exception, which he currently sets at "three or fewer days," *id.* at 45, while also contending that the period between some of the *pro forma* sessions here might be counted as four days. *Id.* at 44 n.45. But there is no assurance that the President or his successors may not claim the power to act unilaterally during even shorter breaks. The same rationales the President urges here – the need for prompt action and the President's duty to "take care" that the laws are executed – could well be asserted with respect to shorter breaks.[6] Rather than

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[6] The President seemingly treats his duty to "take care" as justification to circumvent express constitutional limitations. For example, it is axiomatic that the "power of the purse" is vested in Congress. Just because Congress authorized some agency, it does not follow that the President could disregard the lack of appropriations – through "zero funding" or "defunding" – and order subordinates to enforce the substantive statute. *See, e.g.*, Anti-Deficiency Act, 31 U.S.C. § 1341; *United States v. Bean*,

acknowledge that improvements in communications and technology make it infinitely easier to consult with the Senate, even when its members are geographically dispersed, Presidents have relied on the need for faster responses to world events to justify unilateral appointments in ever more brief periods of time, gradually reducing the general rule's role.

The Framers intended for the Senate to serve as a moderating influence on presidential nominations. As Alexander Hamilton explained in *The Federalist No. 76* (Jacob E. Cooke ed., 1961), the Framers denied the President "the absolute power of appointment" because they believed the Senate would "tend greatly to prevent the appointment of unfit characters" and would serve as "an efficacious source of stability in the administration" of government. *Id.* at 513. If the general rule governing appointment of principal officers is swallowed to the extent the President advocates here, the inevitable result will be increasingly extreme and controversial appointees with a concomitant increase in partisan dissension.

III. UNDER THE PRESIDENT'S OWN STANDARD, THE SENATE WAS NOT IN RECESS–MODERN TECHNOLOGY RENDERED IT AVAILABLE TO TAKE OFFICIAL, COLLECTIVE ACTION

A central flaw in the President's position is that it purports to rely upon a functional analysis but then examines only how the government functioned at an earlier point in time. That is, it sets a modern test and

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537 U.S. 71, 74-75 (2002). So too, he may not rely on the existence of statutory authorization of an agency to justify appointment of an officer by means other than what the Constitution provides.

then concludes that remote historical examples fail the modern test. Other briefs before the Court demonstrate that under a consistent approach that emphasizes textual analysis or the contemporaneous public understanding of the Constitution, the appointments at issue here are outside the President's appointment power. If the functional analysis advocated by the President is applied in a consistent manner, it illustrates that the Senate was available to act in its official, collective capacity, thereby rendering the challenged NLRB appointments invalid under that analysis, as well.

A. The Test the President Advocates

The President repeatedly asserts that the key question in determining whether the recess appointment exception applies is whether the Senate is available to take official, collective action with respect to a nominee. *E.g.*, Pet. Br. at 18 ("render the Senate unavailable to provide advice and consent"), *id.* at 19 ("when the Senate is unavailable to offer its advice and consent"), *id.* at 20 ("despite its unavailability to give advice and consent"). The "essential facts" upon which the President relies are that "the Senate had undertaken to conduct 'no business' and was no more available to sit as a body than it is during a traditional intra-session recess." *Id.* at 45. But in applying that "functional understanding," *id.*, much weight is placed on the availability of the Senate under the conditions existing in the years 1905 (*id.* at 24, 45-46), 1921 (*id.* at 46), and 1929 (*id.* at 46-47). There is no analysis of whether the Senate was available to take official, collective action with the benefit of the technology of 2011.

B. Actuality Proves Possibility

In December 2011, during the period governed by the very same Senate order at issue here, despite geographical dispersal of many of the Senators, the Senate heard the President's call for prompt legislative action before the end of the calendar year. Acting in its official, collective capacity, the Senate passed the Temporary Payroll Tax Cut Continuation Act of 2011, 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011), which was presented to the President for his signature. Pub. L. No. 112-78, 125 Stat. 1280 (2011). Those facts demonstrate that the Senate was available under any "functional" test.

As the President acknowledges, the Senate's action of December 23, 2011, was not an isolated incident. There are other recent examples of official, collective action by the Senate, despite the geographical dispersion of individual Senators. Pet. Br. at 52 n.49. The very same mechanisms that permitted such actions could easily have permitted the Senate here to act on nominations to fill vacancies either in the event of an urgent need to fill the post or in the event of a non-controversial nominee.

C. The Necessary Conditions for Official, Collective Action

As a practical matter, the mechanisms that permitted the Senate to pass a bill on December 23, 2011, were unavailable throughout much of American history due to limitations of technology. The required mechanisms are: (1) the ability of the President to communicate a nomination to a Senate officer; (2) the ability of that officer to communicate the fact of the nomination to the individual Senators wherever they may be located; (3) the ability of the individual

Senators to caucus with one another and as a group as to the advisability of confirming the nominee; (4) the ability of Senate leaders to poll individual Senators for their views to determine whether there exists a consensus that permits action; (5) if there is such a consensus, calling for and engaging in official floor action; and (6) upon completion of the official floor action, communicating the result to the President.

With the advent of the Internet, cellular and satellite telephones, "smart phones" and personal digital devices, mass party conference calls, e-mail, television and streaming video, even multi-party communications are achieved in a matter of minutes. The ubiquitous nature of transcontinental commercial aviation, air and rail shuttles that operate several times each day, and the automobile and interstate highway system together mean that official Senate action need never be delayed due to geographical dispersion by more than a day or two from the initial nomination. Consequently, as a practical matter, the Senate is always available to act on a nomination if there is sufficient consensus to do so. The absence of consensus is not related to geographical dispersion.

The Constitution is explicit that "[e]ach House may determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2. Accordingly, the Senate has the sole authority to authorize a session, even while many of the individual Senators are geographically dispersed. This Court has long recognized that where "[t]he Constitution has prescribed no method of making [a] determination" as to a question of congressional procedure, "all matters of method are open to the determination of the house [of Congress in question], and it is no impeachment of the rule [chosen by that house] to say that some other way would be better,

more accurate, or even more just." *United States v. Ballin*, 144 U.S. 1, 5 (1892).

It may be difficult to comprehend how vastly different the Senate can function today compared to 1789, 1840, 1905, 1929 or even 1970. As a starting point, it is essential to recognize that prior to the 1844 commercialization of the telegraph, communication was no faster than the speed of travel by horse. Allan R. Pred, *Urban Growth and the Circulation of Information: The United States System of Cities, 1790-1840*, at 12 (1973). When the Constitution was drafted and ratified, the speed of travel had not yet benefitted from the introduction of significant turnpikes or bridges, let alone steamboats and railroads. George Rogers Taylor, *The Transportation Revolution, 1815-1860*, at 15, 17-18, 57, 76-77 (1951).

The postal system then consisted of only 69 offices that did little more than "link[] the major Atlantic seaport towns and offered no special facilities for the press." Richard R. John, *Spreading the News: The American Postal System from Franklin to Morse*, at 27, 64 (1995). As late as 1828, "American postal officers had at their disposal few mechanical contrivances that would have been unfamiliar to the ancients. [At that time] the fastest, cheapest, and most reliable way to transmit information over land was by horse express, just as it had been in ancient Greece and Rome." *Id.* at 110. The slow speed of postal communications was further hampered by the fact of infrequent service. For example, in 1785, mail between New York City and Albany ran only once every two weeks. Wesley Everett Rich, *The History of the United States Post Office to the Year 1829*, at 60-61 (1924). In 1788, mail

from Philadelphia to Lancaster and York, Pennsylvania, ran once per week. *Id.* at 64. On other routes, mail ran only monthly. *Id.* at 76, 85.

In the Framers' experience, there was no practical means for Senators to consult with each other and reach a consensus when geographically dispersed. The months it would require to exchange correspondence among far-flung Senators would be almost as long as the time before their scheduled return to the Capitol. For example, in 1789 "it took forty days to receive a reply to a letter sent from Portland, Maine, to Savannah, Georgia," and by 1810 that reply time still required twenty-seven days. John, *supra* at 17. Even the biggest items of news disseminated at a pace that demonstrates the futility of trying to coordinate action among geographically dispersed Senators. News of George Washington's 1799 death at Mount Vernon did not reach New York City for a week and did not reach Cincinnati for twenty-four days. Pred, *supra* at 12-14. News of the Battle of New Orleans in 1815 did not reach New York City for twenty-seven days. *Id.*

Even after the introduction of the telegraph and telephone permitted prompt communication between the President and Senate leadership, between Senate leadership and individual Senators, and between two Senators, an essential piece of technology remained missing. Before the recent advent of mass party conference calls, e-mail, and chat features, there was no effective way for groups of Senators to caucus when geographically separated. Those innovations dramatically change the ability of the Senate to operate from what was the fact in 1905 and 1929.

The final innovation required was the procedure to schedule a Senator to take the floor on a periodic basis,

even if other Senators were geographically dispersed. That development, together with the Senate's long practice of operating by unanimous consent (and its presumption of a quorum), provided a ready means for the Senate to take official, collective action, even if most Senators were not physically present in the Chamber. In a very real sense, the Senate did make itself available to act on presidential nominations in December 2011 and January 2012, by scheduling such sessions. If the President had nominated someone who was not controversial to a position that genuinely required prompt action, the Senate was available to perform its advice and consent function.

Even in the absence of unanimity with respect to a nominee, in the event of need for immediate action, Senate leadership could communicate the necessity to reassemble and gather the individual Senators at the Capitol within three days. Advances in communications and transportation mean that, as a practical matter, the Senate is rarely, if ever, unavailable for a period greater than three days. The President acknowledges that a break of that length is too brief to authorize his unilateral appointment of principal officers. Pet. Br. at 45.

D. The Remaining Scope of the Recess Appointment Exception

The President may object that the consequence of actually applying the functional test he advocates to the *current* ability of the Senate to demonstrate its availability at virtually all times should prompt the Court to take a different approach so as to not render the recess appointment exception mere surplusage. That argument assumes that the Senate would never again actually recess rather than remain in *pro forma* session, which is unlikely, particularly when the

President's political party either controls both houses of Congress or has a filibuster-proof majority in the Senate.

That argument also would be misplaced. There are several substantive provisions in the Constitution that, simply due to changed circumstances, are now merely vestigial, such as the article I, section 2, paragraph 3 allocation of Representatives in the House prior to the first census. The provision for a citizen of the United States "at the time of the Adoption of this Constitution" to be eligible to be President also has no current utility. U.S. Const. art. II, § 1, ¶ 5.

Moreover, the recess appointment exception could well have future applicability. In the event of a Clancyesque mass destruction that results in the death or incapacitation of the entire Senate,[7] for example, the President would not need to wait for States to send replacement Senators before appointing officers essential to addressing such an attack. And, should a breakdown in modern communications and transportation technology occur that would, as a practical matter, render the Senate unavailable to take official, collective action, the exception also provides the necessary safeguard.

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[7] *See* Tom Clancy, *Debt of Honor* (1994).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

GLENN M. TAUBMAN
JOHN N. RAUDABAUGH
NATIONAL RIGHT TO WORK
LEGAL DEFENSE
AND EDUCATION
FOUNDATION, INC.
8001 Braddock Road
Suite 600
Springfield, VA 22160
(703) 321-8510
gmt@nrtw.org
jnr@nrtw.org

THOMAS H. ODOM
Counsel of Record
PRINCE LAW OFFICES, P.C.
646 Lenape Road
Bechtelsville, PA 19505
(888) 313-0416
todom@princelaw.com

November 25, 2013

AMICUS CURIAE BRIEF

No. 12-1281

IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF ORIGINALIST SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

MICHAEL R. DEVITT
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
SUPREME COURT CLINIC
5998 Alcala Park
San Diego, CA 92110
(619) 260-2992
mdevitt@sandiego.edu

MICHAEL D. RAMSEY
Counsel of Record
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
5998 Alcala Park
San Diego, CA 92110
(619) 260-4145
mramsey@sandiego.edu

Attorneys for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF *AMICI CURIAE*

This brief of *amici curiae* in support of Respondent is respectfully submitted by law professors with expertise in Constitutional Law, presidential power, and separation of powers considered from the perspective of the Constitution's original meaning.[1] *Amici* submit this brief because they believe that Petitioner's arguments in this case would dramatically and improperly expand presidential appointments power beyond that set forth in the original meaning of the Constitution's text and would materially undermine the advice-and-consent power the Framers vested with the Senate as a check on presidential appointments.

A list of *amici curiae* appears as Appendix A.

SUMMARY OF ARGUMENT

The Appointments Clause provides for appointment of officers of the United States by the President with the Senate's advice and consent. Art. II, § 2, cl. 2. As Alexander Hamilton explained, it is the "general mode of appointing officers of the United States," *The Federalist No. 67*, at 409 (Hamilton) (Clinton Rossiter ed., 1961), and serves as an "excellent check" upon "unfit" presidential nominations. *The Federalist No. 76*, at 457 (Hamilton) (Clinton Rossiter ed., 1961). Although the Framers understood that vesting appointments jointly in two entities would be slower

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[1] The parties' written consents to the filing of this brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

and potentially more contentious than granting a unilateral power, they decided the benefits outweighed the costs.

The Recess Appointments Clause, which gives the President "Power to fill up all Vacancies that may happen during the Recess of the Senate," Art. II, § 2, cl. 3, is an "auxiliary method" of appointment designed for the long breaks the Framers anticipated between legislative sessions. *Federalist 67*, at 409. It contains two important textual limitations that prevent it from displacing the Appointments Clause as the "general mode" of appointment: (1) the vacancy must *arise* ("happen") when the Senate is in recess; and (2) "the Recess" refers only to the break between legislative sessions. See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487 (2005); *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

Petitioner would read the Recess Appointments Clause to allow almost complete circumvention of the Appointments Clause by defining "happen" to mean "exist" (rather than "arise") and by labeling every legislative break a "Recess" (perhaps subject to some minimum duration of unclear length and derivation). Combining these arguments, Petitioner would allow the President to fill *any* vacancy that exists simply by waiting for the Senate to take a break of brief duration.

Under the Constitution's original meaning, Petitioner is wrong on both counts. The original meaning of "happen" in the Recess Appointments Clause is "arise." That is consistent with the prevailing eighteenth-century dictionary definition. See, *e.g.*, Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "happen" only as "to fall

out; to chance; to come to pass"). Reading "happen" to mean "arise" avoids making the phrase "that may happen" in the Recess Appointments Clause superfluous (as it would be under Petitioner's definition). The Constitution's other uses of the word "happen"—in the Senate Vacancies Clause, Art. I, § 3, cl. 2, and the House Vacancies Clause, Art. I, § 2, cl. 4—both evidently use "happen" to mean "arise." This reading is also consistent with the purpose of the Recess Appointments Clause, which was to provide for appointments during the anticipated long intersession breaks without undermining the advice-and-consent procedure as the general mode of appointment. See Rappaport, 52 UCLA L. Rev. at 1500-01.

Key figures from the founding generation, including Hamilton, Attorney General Edmund Randolph, and commentator St. George Tucker, read the Recess Appointments Clause to cover only vacancies that arose in the recess. The practice of the Washington administration and the pattern of legislation in the early post-ratification era confirm this reading. See *id.* at 1522-25. Other founding-era sources, including eighteenth-century state constitutions, also used "happen" to mean "arise" in the context of vacancies. *E.g.*, Mass. Const., Pt. 2, Ch. I, § II, Art. IV (1780); N.H. Const., Pt. 2, Art. 34 (1784).

Petitioner argues that the President must be able to fill vacancies that exist during the recess, even if they arose earlier, or offices may remain vacant. But these concerns are overstated. If vacancies arise near the end of the session, the President can urge the Senate to act quickly or extend its session (or may even call the Senate back into session). Moreover, Congress can redress the matter by legislation. For inferior officers,

Congress can give the President sole power of appointment. Art. II, § 2, cl. 2. And Congress can provide for what are now known as acting appointments, whereby an existing officer can perform the duties of a second office when the latter becomes vacant. See Rappaport, 52 UCLA L. Rev. at 1514. Congress has routinely employed both strategies to address late-session vacancies. See *Noel Canning*, 705 F.3d at 511.

Second, the original meaning of "the Recess" in the Recess Appointments Clause is the break between legislative sessions. Eighteenth-century language provides two possible semantic meanings of "recess": it could mean either generically any break in the legislature's conduct of business or specifically the break between sessions. The Constitution's text, structure, and purpose show that it has the latter meaning in the Recess Appointments Clause.

Pre-ratification materials, including state constitutions, used "recess" to mean the time that the legislature was not in session. *E.g.*, Mass. Const., Pt. 2, Ch. II, § I, Art. V (1780). Hamilton in *Federalist 67* and post-ratification congressional statutes also used it this way, pairing the "recess" and the "session" as two distinct periods. Because the Framers anticipated long intersession breaks and only short breaks within sessions, it makes sense that they would establish a special appointments process only for intersession breaks. Reading "the Recess" to mean any break in legislative business, even of short duration, makes little sense in terms of the concerns of the Framers, who understood that offices would be vacant for temporary periods as a result of the ordinary advice-and-consent requirement.

Further, other aspects of the Constitution's text support the narrower meaning. The Constitution uses

another word, "Adjournment," to refer to any break in legislative business. The only way to explain the Constitution's use of both "Adjournment" and "Recess" is to read "Recess" to mean the break between sessions. Moreover, the Recess Appointments Clause itself indicates that it addresses the break between sessions by providing that recess appointments last until "the End of [the Senate's] next Session." Art. II, § 2, cl. 3. If "the Recess" is read to mean any break in legislative conduct of business, appointments would implausibly last from the date of the appointment, through the end of the existing session, through the intersession recess, and through the entire subsequent session.

Petitioner appears to suggest an intermediate meaning of "Recess" which would include intrasession breaks of sufficient length that the Senate is "practically unavailable" to consider nominees. However, there is no basis in any eighteenth-century meaning for this definition and it is inconsistent with founding-era materials' pairing "the session" with "the recess." Further, it is hopelessly indeterminate. There would be no reliable way to determine which breaks would count as recesses and which would not. Tellingly, Petitioner does not provide any firm definition, and in the past the Executive Branch has indicated that breaks as short as ten days or even less can qualify, even though it is implausible that the Framers would have been concerned about unfilled vacancies of such short duration.

ARGUMENT

I. THE APPOINTMENTS CLAUSE IS THE PRIMARY METHOD OF APPOINTING OFFICERS OF THE UNITED STATES, WHILE THE RECESS APPOINTMENTS CLAUSE SERVES ONLY AN AUXILIARY ROLE.

The Constitution's Framers established the Appointments Clause as the principal method of appointing officers of the United States. It provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States. . . .

Art. II, § 2, cl. 2. Notably, the Framers chose to confer appointment power on two entities jointly rather than one—a deliberate departure from British practice in which the monarch alone held the appointment power. See 1 William Blackstone, *Commentaries on the Laws of England* 271-73 (1765).

The Framers surely understood that this process would be slower and potentially more contentious than appointment by the President alone, but they decided the benefits outweighed the costs. As Alexander Hamilton explained, the Senate

> would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity.

The Federalist No. 76, at 457 (Hamilton) (Clinton Rossiter ed., 1961).

The Framers also included two supplemental methods of appointment. First, "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2, cl. 2. Second, central to the present litigation, the Recess Appointments Clause provides:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions, which shall expire at the End of their next Session.

Art. II, § 2, cl. 3.

Both supplemental methods of appointment are sharply limited. The first gives the President unilateral appointment power only upon Congress' formal consent and only for "inferior Officers." Superior officers must still be appointed through the advice-and-consent procedure, even if Congress prefers otherwise. The second, the Recess Appointments Clause, gives the President unilateral appointment power only for vacancies that happen during the Senate's recess. As explained below, this language contains two important textual limitations: (1) the vacancy must *arise* ("happen") when the Senate is in recess; and (2) "Recess" refers only to the break between legislative sessions. See Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487 (2005); *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013).

Thus the advice-and-consent procedure constitutes Article II's principal method of appointment, with limited exceptions. As Hamilton explained:

> The relation in which [the Recess Appointments Clause] stands to the [Appointments Clause], which declares the general mode of appointing officers of the United States, denotes it to be nothing more than a supplement to the other for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate.

The Federalist No. 67, at 409 (Hamilton) (Clinton Rossiter ed., 1961).

Petitioner would read the Recess Appointments Clause to allow almost complete circumvention of the Appointments Clause as the "general mode" of appointing officers. First, Petitioner would define "happen" to mean "exist" (rather than "arise"), so that the President could fill any vacancy that continues into a recess even if it arose when the Senate was in session but the President declined to make a nomination or the Senate declined to give its consent. Second, Petitioner would label every legislative break a "Recess" (perhaps subject to some minimum duration of unclear length and derivation). By combining these arguments, Petitioner would render the advice-and-consent requirement effectively optional: the President could unilaterally fill *any* vacancy that exists simply by waiting for the Senate to take a short break.

II. THE ORIGINAL MEANING OF "HAPPEN" IN THE RECESS APPOINTMENTS CLAUSE LIMITS THE PRESIDENT'S RECESS APPOINTMENTS POWER TO VACANCIES THAT ARISE DURING THE SENATE'S RECESS.

The Recess Appointments Clause gives the President "Power to fill up all Vacancies *that may*

happen during the Recess of the Senate . . . ." Art. II, § 2, cl. 3 (emphasis added). Petitioner argues that the phrase "that may happen" refers to any vacancy that *exists* during the Senate's recess, regardless of when the office first became vacant. To the contrary, the text, structure, and history of the phrase unambiguously establish that vacancies "happen" when they arise.

A. The Constitution's Text Makes Clear that Vacancies "Happen" when They "Arise."

Defining "happen" in the Recess Appointments Clause to mean "arise" best comports with the Constitution's text. First, founding-era dictionaries consistently defined "happen" to mean "to come to pass" or something similar. See, *e.g.*, Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "happen" only as "to fall out; to chance; to come to pass"); see also *Evans v. Stephens*, 387 F.3d 1220, 1230 & n.4 (11th Cir. 2004) (en banc) (Barkett, J., dissenting) (collecting additional founding-era dictionary definitions); Robert G. Natelson, *The Origins and Meaning of "Vacancies that may happen during the Recess" in the Constitution's Recess Appointments Clause*, 37 Harv. J.L. & Pub. Pol'y (manuscript at 37) (forthcoming 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_*id*=2257801) (same).[2] Thus, under the prevailing

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[2] Additional founding-era dictionary definitions include Francis Allen, *A Complete English Dictionary* (1765) (defining "happen" as to "fall out, to come to pass, to light upon or meet with by chance"); John Ash, *The New and Complete Dictionary of the English Language* (1775) (defining "happen" as "To fall out, to come to pass, to light upon by accident"); Nathan Bailey, *An Universal Etymological English Dictionary* (25th ed. 1783)

eighteenth-century dictionary definition, the President has unilateral power to fill only vacancies that may "fall out" or "come to pass" during the Senate's recess.

Second, reading "happen" to mean "arise" avoids rendering the phrase "that may happen" in the Recess Appointments Clause superfluous. If the Framers had intended the President to have unilateral power to fill

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(defining "happen" as "to fall out"); James Barclay, *A Complete and Universal English Dictionary* (1792) (defining "happen" as "to fall out; to come to pass without being designed or foreseen; to light upon or meet with by chance, or mere accident, exclusive of any design"); Frederick Barlow, *The Complete English Dictionary* (1772-73) (defining "happen" as "to fall out. To come to pass without being designed. To light upon or meet with by chance, or meer accident"); Edward Crocker, *A New English Dictionary* (1713) (defining "happen" as "to fall out"); Alexander Donaldson, *An Universal Dictionary of the English Language* (1763) (defining "happen" as "to fall out; to chance; to come to pass. To light; to fall by chance"); William Kenrick, *A New Dictionary of the English Language* (8th ed. 1786) ("To fall out; to chance; to come to pass—To light; to fall by chance"); William Perry, *Royal Standard English Dictionary* (1st American ed. 1778) (defining "happen" as "to come to pass, to light on"); Thomas Sheridan, *A Complete Dictionary of the English Language* (1789) (defining "happen" as "to fall out by chance; to light on by accident"); see also Caleb Alexander, *Columbian Dictionary of the English Language* (1800) (defining "happen" as "to fall out, to light on"); John Entick, *New Spelling Dictionary of the English Language* (1800) (defining "happen" as "to fall out, come to pass, chance"); Samuel Johnson, Jr. & John Elliott, *Selected Pronouncing and Accented Dictionary* (1800) (defining "happen" as "to fall out, come to pass"); John Walker, *Critical Pronouncing Dictionary and Expositor of the English Language* (1803) (defining "happen" as "to fall out by chance, to come to pass; to light on by accident"); Noah Webster, *A Compendious Dictionary of the English Language* (1806) (defining "happen" as "to fall out, come to pass, chance"). But see Thomas Dyche & William Pardon, *A New General English Dictionary* (1777) (defining "happen" as "to be").

vacancies during a recess regardless of when the vacancies arose, they could simply have written: "The President shall have Power to fill up all Vacancies during the Recess of the Senate." Instead, they included the phrase "that may happen." But if "that may happen" means only "that may exist," it adds nothing. See Rappaport, 52 UCLA L. Rev. at 1504; *Noel Canning*, 705 F.3d at 507. To give the phrase meaning, it must limit the President's recess appointment power to vacancies that "come to pass" ("happen" in Johnson's definition) during the recess.

Third, the use of "happen" elsewhere in the Constitution supports this reading. Article I reads: "if Vacancies [in the Senate] happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature. . . ." Art. I, § 3, cl. 2.[3] This Clause plainly uses "happen" to mean "arise." Vacancies do not *exist* "by resignation"; they *arise* "by resignation." Similarly, Article I provides: "When vacancies happen in the Representation [in the House] from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." Art. I, § 2, cl. 4. Again, "happen" in this Clause refers to the point at which the office becomes vacant, thus triggering the Executive's obligation. See Rappaport, 52 UCLA L. Rev. at 1505-06.

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[3] Initially, state legislatures determined the method of choosing Senators. Art. I, § 3, cl. 1 (superseded by the Seventeenth Amendment).

B. The Structure and Purpose of the Appointments Clause Confirm that the Original Meaning of the Recess Appointments Power Is Limited to Vacancies that Arise During a Recess.

The Appointments Clause mandates that the Senate give advice and consent before an appointment is complete. As Hamilton explained, this Clause provides the "general mode of appointing officers of the United States" and serves as an "excellent check" upon "unfit" presidential appointments. *Federalist 67*, at 409; *Federalist 76*, at 457. Thus, the Constitution directed that the Senate would ordinarily have a veto over presidential nominations.

Limiting the Recess Appointments Clause to vacancies that arise during a Senate recess is consistent with this purpose, providing the President a circumscribed unilateral appointment power where the Senate was likely not to meet for long periods of time. During the founding era, recesses lasted as long as six to nine months, and travel and communications were difficult. See Rappaport, 52 UCLA L. Rev. at 1500-01. If vacancies arose during a recess, the Recess Appointments Clause allowed the President to fill them without the difficulty and inconvenience of reconvening the Senate. See *Federalist 67*, at 409. But many vacancies—those that arose during a session—would continue to be governed by the preferred advice-and-consent procedure.

In contrast, reading the Recess Appointments Clause to cover any vacancy that *exists* during a recess is inconsistent with the advice-and-consent procedure serving as an effective check on presidential nominations. If the President can fill vacancies that arise during the Senate's session and continue into the

recess, the President could unilaterally fill any vacancy simply by waiting for a recess. Significantly, the President could adopt this approach for any nominee the Senate rejected, declined to approve, or appeared likely to oppose, thereby defeating the check the Framers intended to supply through the Appointments Clause. As constitutional historian David Currie observed:

> The [Recess Appointment Clause's] text appears to require that the vacancy *arise* while the Senate is out of session, and for an understandable reason. If the President could fill all vacancies that existed during a recess . . . , he could frustrate the Senate's veto power by waiting until after adjournment to fill vacancies that occurred while it was in session.

David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801-1829*, at 188 (2001); see also Rappaport, 52 UCLA L. Rev. at 1507 ("There is little reason to require senatorial confirmation if one is simply going to allow the President to easily circumvent that requirement" by waiting until a recess to make a contested appointment).

The Constitution's treatment of appointing inferior officers provides further evidence for the narrower view of the President's recess appointments power. The Framers recognized that the advice-and-consent procedure could be cumbersome and that Congress might sometimes want the President to have unilateral appointments power. But the Framers allowed this departure from the advice-and-consent process only after Congress gave formal approval by law, and only for inferior officers. See Art. II, § 2, cl. 2. Given these restrictions, it is implausible to read the Recess Appointments Clause to give the President a broad

power to appoint officers (including superior officers) unilaterally.

In sum, reading "happen" to mean "exist" is inconsistent with the Constitution's structure and purpose because it would give the President a way largely to avoid the check of the advice-and-consent process for controversial appointments. Reading "happen" to mean "arise," by contrast, preserves the intended purpose of the Appointments Clause and the Senate's ability to reject a President's nominee.

C. Early Congresses and Key Figures from the Founding Generation Read the Recess Appointments Clause to Apply Only to Vacancies that Arose During a Recess.

How a text was interpreted close in time to its enactment is evidence of its original meaning. Leading members of the founding generation understood vacancies to "happen" when the office first became vacant and thus read the Recess Appointments Clause to apply only to vacancies that arose during a recess. Edmund Randolph, Washington's first Attorney General—who had been a Virginia delegate to the Philadelphia convention and a leading figure in the Virginia ratifying convention—opined that the President could not recess-appoint a Chief Coiner of the U.S. Mint when the vacancy arose while the Senate was in session and remained unfilled after the Senate recessed. Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), in 24 *Papers of Thomas Jefferson* 165-67 (John Catanzariti et al. eds., 1990).

As Randolph recounted, the Act establishing the office of Chief Coiner passed on April 2, 1792, and the Senate ended its session on May 8 without any person

having been nominated to the office. Writing to Secretary of State Thomas Jefferson on July 7 (with the Senate still in recess), Randolph concluded that this was a "vacancy" and continued:

> But is it a vacancy which has *happened* during the recess of the Senate? It is now the same and no other vacancy, than that, which existed on the 2nd. of April 1792. It commenced therefore on that day or may be said to have *happened* on that day.

Id. at 166.

Because Randolph concluded that a vacancy "happen[s]" on the day it "commence[s]," he advised Jefferson that the President could not make the appointment. *Id.* at 166-67. Randolph added that the Appointments Clause was the primary means of making appointments and that the Recess Appointments Clause should only be used when absolutely necessary, such as "where the Officer has died, or resigned during the recess . . . ." *Id.* at 166.

Randolph noted a distinct situation in which the Senate approved a nomination but, after the Senate went into recess, the appointed person refused the office. The two circumstances, he said,

> are different in their relation to the constitution. . . . In the one the vacancy was filled up, as far as the President and Senate could go; and the Vacancy may be said to have happened during the Recess in consequence of the Refusal. In the other, not.

Id. at 167.

Hamilton, though generally a strong supporter of executive power in the post-ratification period, expressed a similar view of the recess appointment power. In 1799, the issue arose under President

Adams regarding appointment of army officers. Adams initially thought he might have recess appointment power as to military offices created but not filled during the session. Secretary of War James McHenry wrote to Hamilton, then serving as major general in the army, for advice, expressing his view that "the President alone cannot make certain appointments or fill up vacancies that may happen during a session of the Senate, without an express power derived from an act of Congress." Letter from James McHenry to Alexander Hamilton (April 26, 1799), in 23 *The Papers of Alexander Hamilton* 69 (Harold C. Syrett ed., 1976). Although he presumably wanted the offices filled, Hamilton agreed, responding: "It is clear, that independent of the authority of a special law, the President cannot fill a vacancy which happens during a session of the Senate." Letter from Alexander Hamilton to James McHenry (May 3, 1799), in 23 *Papers of Alexander Hamilton* at 94.[4]

Constitutional commenter St. George Tucker, writing in 1803, echoed Randolph's and Hamilton's conclusion. Tucker observed that ordinarily when the President and Senate disagreed on a nominee, the office would remain vacant; however, he added, "if it should have happened that the office became vacant during the recess of the senate," then the President could make a unilateral appointment. St. George

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[4] In his 1787 written plan for the Constitution, Hamilton used "happen" to mean "arise" in connection with the death or resignation of his life-tenure president: "The Judges of the Supreme Court shall within sixty days after a vacancy shall happen, cause public notice to be given in each State of such vacancy. . . ." 3 *The Records of the Federal Convention of 1787*, at 622 (Max Farrand ed., 1911).

Tucker, *View of the Constitution of the United States* 279-80 (1803) (Clyde N. Wilson ed., 1999).

President Washington also appeared to share a narrow view of the recess appointments power. First, he followed Randolph's advice regarding the Chief Coiner. Washington apparently wanted the position filled promptly but waited until the Senate reconvened that winter to make a nomination. See S. Exec. Journal, 2d Cong., 2d Sess. 127 (1793) (nominating Henry Voigt as Chief Coiner); Timeline of the United States Mint, http://www.usmint.gov/education/historian_scorner/?action=timeline (reflecting initial appointment of Chief Coiner as Jan. 28, 1793). Additionally, Washington filled vacancies that remained late in the Senate's session by submitting a long list of nominees sometimes without knowing if the nominees would accept the nomination. If a person then turned down the appointment after the session ended, Washington treated this as a new vacancy and made a recess appointment. See Rappaport, 52 UCLA L. Rev. at 1522; see also S. Exec. Journal, 1st Cong., 1st Sess. 29-35 (1789) (reflecting nomination of 95 officers and judges in the last days of the session). If Washington thought the President could make recess appointments to fill vacancies that arose during the session, this practice would have been unnecessary.

Early Congresses also apparently thought the President could not unilaterally make recess appointments to fill vacancies that arose during a session, and thus provided statutory authority for him to do so for certain inferior officers. For example, a 1791 statute provided for inspectors of surveys to be appointed by the President with the Senate's advice and consent, but if appointments were not made "during the present session of Congress" the President was

empowered to "make such appointments during the recess of the Senate." Act of Mar. 3, 1791, ch. 15, § 4, 1 Stat. 199, 200. See also Act of Mar. 2, 1799, ch. 31, § 2, 1 Stat. 725 (giving power to appoint army officers during the Senate's recess); Act of July 16, 1798, ch. 79, § 8, 1 Stat. 604, 605 ("And in recess of [the] Senate, the President of the United States is hereby authorized to appoint all the regimental officers proper to be appointed under this act, and likewise to make appointments to fill any vacancies in the army, which may have happened during the present session of the Senate."); Act of Mar. 3, 1799, ch. 47, 1 Stat. 749 (similarly authorizing the President "to make appointments to fill any vacancies in the army and navy which may have happened during the present session of the Senate"); Rappaport, 52 UCLA L. Rev. at 1524-25 & n.103.

D. Other Founding-Era Sources Used "Happen" to Mean "Arise."

In addition to founding-era dictionaries, eighteenth-century state constitutions used "happen" to mean "arise" rather than "exist." The Massachusetts Constitution of 1780 outlined how "vacancies in the senate, arising by death, removal out of the state, or otherwise, shall be supplied as soon as may be, after such vacancies shall happen." Mass. Const., Pt. 2, Ch. I, § II, Art. IV (1780). See also N.H. Const., Pt. 2, Art. 34 (1784) (using almost identical language).

Many state legislative records are to the same effect. For example, a 1782 resolution of the Rhode Island legislature stated that a battalion captain vacancy "happened" on the day the captain resigned. Natelson, 37 Harv. J.L. & Pub. Pol'y at 45. Similarly, a Connecticut legislative resolution provided that a lieutenant

colonel's office "became vacant" when the officer was promoted and observed that another officer claimed a right to be promoted into that vacancy "when it happened." *Id.* at 46. See also *id.* at 39-47 (providing additional examples).

E. Petitioner Provides No Reason to Doubt the Limited Reading of the President's Recess Appointments Power.

Petitioner principally argues that limiting the recess appointments power to vacancies that arise during a recess would prevent the President from making necessary appointments. In particular, Petitioner points to problems that might result if vacancies arise by death or resignation—or if offices are created—too near the end of a session to allow the Senate to act on a nomination. Pet. Br. 31-33.

These concerns are overstated. The President has several constitutional options if filling a vacancy appears crucial. The President could urge the Senate to extend its session or act quickly prior to recess, or in an extreme case, the President could call the Senate back into session. See Art. II, § 3 (providing this power). Further, Congress can address such potential vacancies by providing (for inferior officers) that the President alone has the power to fill them, see Art. II, § 2, cl. 2, and by providing for what are now called acting appointments.

The acting appointments approach allows an existing officer to perform the duties of a second office when the latter becomes vacant. See Rappaport, 52 UCLA L. Rev. at 1514 (explaining that "[f]or example, Congress could provide that when the office of the Attorney General becomes vacant, the Deputy

Attorney General, who has been appointed with the consent of the Senate, should serve as Acting Attorney General and perform the duties of that office").[5] Congress implemented this approach very broadly from the outset, providing in a 1792 statute that "in the case of death, absence from the seat of Government or sickness" of the Secretaries of War, State, or Treasury "or of any officer of either of the said departments" the President may "authorize any person or persons at his discretion to perform the duties of the said respective offices." Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281. In this way, Congress can assure that vital duties will be performed, and provisions for acting appointments are commonplace today. See *Noel Canning*, 705 F.3d at 511 (listing statutes).

Petitioner's reading of "happen" would allow the President to fill not only vacancies that arise near the end of the session, but all vacancies for which the President and the Senate have not agreed on an appointment prior to a recess. This outcome fundamentally conflicts with the purpose of the Appointments Clause, which was to provide a check on presidential appointments. See *Federalist 76*, at 457. As discussed above, the advise-and-consent requirement of the Appointments Clause and the prohibition against presidential appointment of even inferior officers without a grant of authority from Congress show that the Framers intended, as a general matter, to give the

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[5] Speaking precisely, "acting appointments" statutes do not allow unilateral presidential "appointments" of superior officers (which would be unconstitutional); rather, by Congress' power to define the powers and duties of statutorily created offices, they allow the President to reallocate a vacant office's duties to a different officer (at the very least, where the acting duties are within the contemplated scope of the initial appointment). See Rappaport, 52 UCLA L. Rev. at 1514-15 & n.78.

Senate veto power over presidential appointments even at the cost of some offices remaining vacant. Because Petitioner's interpretation would allow the President to circumvent Senate opposition to controversial nominees and thereby thwart rather than facilitate the Framers' design, it is unlikely to be the original meaning of "happen."

Petitioner also contends, Pet. Br. 39-40, that President Washington made recess appointments of Robert Scot and William Clarke to positions that became vacant during a session. However, Washington himself described these positions as having become vacant during a recess. S. Exec. Journal, 3d Cong., 1st Sess. 142-43 (1793) (Washington, when nominating Scot as Engraver of the Mint, stating, "I nominate the following persons to fill the offices annexed to their names respectively; to which, having fallen vacant during the recess of the Senate, they have been appointed."); S. Exec. Journal, 4th Cong., 2d Sess. 216-17 (1796) (Washington nominating Clark[e] to an office "which became vacant during the recess of the Senate"). Even if the actual facts of the vacancies are ambiguous,[6] Washington apparently believed the vacancies arose during the recess and thought this point was worth reciting to the Senate.

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[6] As to Clarke, Petitioner concedes that the office may have become vacant in October 1794, see Pet. Br. 40 n.31, which was during a previous recess. As to Scot, the office of Engraver may not have become vacant until the recess because the Chief Coiner may not have ceased exercising the duties of Engraver pursuant to the President's direction until after the recess began. See The Originalism Blog, May 20, 2013, http://originalismblog.typepad.com/the-originalism-blog/2013/05/originalism-recess-appointments-and-the-sgs-noel-canning-cert-petitionmike-rappaport.html.

Petitioner's claim that Presidents Adams, Jefferson, and Madison thought they could make recess appointments to offices that became vacant during the session is similarly weak. As to Adams, Petitioner relies on an ambiguous statement that does not clearly assert such a power. Pet. Br. 41; see Rappaport, 52 UCLA L. Rev. at 1535. As noted above, Part II.C., Hamilton and McHenry advised that Adams could not make such appointments, and Petitioner cites no direct evidence that Adams did so.[7]

Regarding the Jefferson and Madison presidencies, Petitioner cites only scattered practice that may be subject to historical ambiguities or explained on other grounds. In any event, occasional executive branch practice, unsupported by a well-considered reading of the Constitution's text and occurring in some cases twenty years or more after ratification is not sufficient to unsettle the strong textual and structural evidence set forth above. See Rappaport, 52 UCLA L. Rev. at 1537-38 (noting that subsequent evidence is a poor indicator of the text's meaning where "motivated by the interpreter's self-interest" or "taken without significant attention to the constitutional question").

Petitioner also relies, Pet. Br. 30, on the 1823 opinion of Attorney General Wirt, who concluded

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[7] Petitioner acknowledges that Adams agreed "to suspend [the appointment in question] for the present, perhaps till the meeting of the Senate[.]" Pet. Br. 41. Petitioner points to Jefferson's recollection that Adams' attorney general, Charles Lee, told Jefferson that "whenever an office became vacant so short a time before Congress rose, as not to give an opportunity of inquiring for a proper character, [the Adams administration] let it lie always till recess[.]" *Id.* Even if this account is correct, Lee may have been talking about offices the President had statutory authority to fill during a recess, a power commonly provided at the time.

(contrary to Randolph's 1792 opinion) that the President could make recess appointments to offices that became vacant during a session. 1 Op. Att'y Gen. 631-32 (1823). Wirt's opinion is unpersuasive evidence of the Clause's meaning for multiple reasons. Wirt was not a member of the founding generation, and so his reading, some thirty-five years after the Convention, is much less probative than the contrary readings of Convention delegates Randolph and Hamilton. Wirt was also serving in the Executive Branch at the time and so had an institutional incentive to favor a broad interpretation of presidential power. Further, even Wirt conceded that the better reading of the "letter" of the Constitution was to limit the power to vacancies that arose during the recess. *Id.* at 633-34. Wirt settled on a broader reading, despite the text, because he was concerned about vacancies that arose at the end of a session or where the Senate might be unable to act for reasons such as invasion or natural disaster. But as discussed above, these potential problems had several ready solutions, including statutes providing for acting appointments.

In sum, Petitioner provides no reason to doubt the evident original meaning of the word "happen." As Randolph concluded in 1792, a vacancy happens when it commences. If it does not commence during a recess of the Senate, the President may not bypass the ordinary method of making appointments.

III. THE ORIGINAL MEANING OF "THE RECESS" IN THE RECESS APPOINTMENTS CLAUSE IS THE BREAK BETWEEN LEGISLATIVE SESSIONS.

The Recess Appointments Clause permits the President to bypass the Appointments Clause's advice-and-consent procedure only for vacancies that happen

"during the Recess of the Senate." Art. II, § 2, cl. 3. Eighteenth-century language provides two possible semantic meanings of "recess." First, "recess" was used specifically to mean the break between legislative sessions; that is, a legislative body was either "in session" or "in recess." Second, "recess" could be used more generically to refer to any break in a legislature's conduct of business, including short breaks during a session. See Johnson, *Dictionary of the English Language* (defining "recess" as "remission or suspension of any procedure"). As set forth below, the first meaning—that "recess" indicates the time between legislative sessions—best comports with the Constitution's text, structure, and purpose.

A. Pre- and Post-Ratification Materials Show that "Recess" Was Used to Refer Specifically to the Time Between Legislative Sessions.

Eighteenth-century state constitutions used "recess" to refer to the time that the legislature was not in session. The Massachusetts Constitution of 1780, which was a source for many provisions of the U.S. Constitution, provided:

> The Governor, with advice of Council, shall have full power and authority, during the session of the General Court [*i.e.*, the Massachusetts legislature], to adjourn or prorogue the same to any time the two Houses shall desire . . . and, in the recess of the said Court, to prorogue the same from time to time, not exceeding ninety days in any one recess; . . . .

Mass. Const., Pt. 2, Ch. II, § I, Art. V (1780). See also N.H. Const., Pt. 2, Art. 50 (1784) (using nearly identical language).

These provisions contemplated two distinct periods—"during the session" and "in the recess"—in which the Executive had different powers. See Rappaport, 52 UCLA L. Rev. at 1552. During the session, the Executive could both adjourn and prorogue the legislature. In the recess, the Executive could only prorogue the legislature. The lack of authority to adjourn the legislature during its recess makes sense if the legislative session has ended; by definition, a legislature cannot be adjourned when it is not in session. In contrast, if "the recess" included times when the legislature was in session, there would be no reason not to give the Executive a power of adjournment. *Id.* at 1552-53.

Using "recess" specifically to mean an intersession break has antecedents in English terminology. Blackstone used the term "recess" to refer to the period between parliamentary sessions. See 4 William Blackstone, *Commentaries on the Laws of England* 260 (1769) ("During the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward, but before the [high court of parliament]. . . . But in the court of the lord high steward, which is held in the recess of parliament, he is the sole judge in matters of law. . . ."); 3 William Blackstone, *Commentaries on the Laws of England* 57 (1768) ("This committee seems to have been established, lest there should be a defect of justice, for want of a supreme court of appeal, during the intermission or recess of parliament; for the statute further directs, that if the difficulty be so great, that it may not well be determined without assent of parliament, it shall be brought by the said [committee] unto the *next* parliament, who shall finally determine the same.").

Founding-era state legislatures also used the term "recess" to differentiate between the legislative session and the intersession period. For example, a 1778 order of the Virginia House of Delegates stated:

> *Ordered*, That the delegates for the several counties consult with their constituents, during the recess of Assembly, on the justice and expediency of passing [a bill] . . . and that they procure from them instructions, whether or not the said bill shall be passed, and lay the same before the House of Delegates at their next session.

Journal of the House of Delegates of the Commonwealth of Virginia (1777-81), at 123 (Thomas W. White ed., 1827). If a recess occurred during the legislative session, there would be no reason to require the delegates to wait until the next session to bring those concerns to the House. See Natelson, 37 Harv. J.L. & Pub. Pol'y at 19-36 (collecting similar usage from multiple states).

Similarly, statutes passed in the early post-ratification period distinguish between "the recess" and "the session." See, *e.g.*, Act of Sept. 22, 1789, ch. 17, § 4, 1 Stat. 70, 71 (providing the Senate's engrossing clerk compensation of "two dollars per day during the session, with the like compensation to such clerk while he shall be necessarily employed in the recess"); Act of Mar. 3, 1791, ch. 15, § 4, 1 Stat. 199, 200 (permitting presidential appointments "during the recess" for vacancies that occurred "during the present session"); Act of July 16, 1798, ch. 79, § 8, 1 Stat. 604, 605 (similar).

B. The Recess Appointments Clause Addressed the Inadequacies of Advice-and-Consent Appointments During the Lengthy Intersession Recesses Anticipated by the Framers.

At the time of drafting, the Framers anticipated that Congress would conduct short sessions with long intersession breaks for much of the year. See 2 *Records of the Federal Convention*, at 199-200 (debating whether Congress' session should be held in the winter or spring). State legislatures at the time followed such a pattern. Robert Luce, *Legislative Assemblies* 154 (1924). Republican political beliefs held that representatives should spend more time as ordinary citizens than as representatives, see Rappaport, 52 UCLA L. Rev. at 1498, 1564, and "[i]n colonial times and indeed up to the development of our railroad systems, the slowness of travel made any but periodical gatherings out of the question." Luce, *Legislative Assemblies*, at 154. Hamilton observed, "[I]t is evident that a portion of the year will suffice for the session of both the Senate and the House of Representatives; we may suppose about a fourth for the latter and a third, or perhaps half, for the former." *The Federalist No. 84*, at 519 (Hamilton) (Clinton Rossiter ed., 1961). As the Framers anticipated, in the immediate post-ratification period Congress typically recessed for long intersession breaks ranging from two months to as long as six or nine months.[8] By contrast, as Petitioner acknowledges, Pet. Br. 14, intrasession breaks in the post-ratification period were typically three days or less.

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[8] See Dates of Sessions of the Congress, 1789-present, http://www.senate.gov/reference/Sessions/reverseDates.htm.

As Hamilton explained, the purpose of the Recess Appointments Clause was to provide a limited mechanism for addressing the inadequacy of the advice-and-consent process during intersession breaks:

> The ordinary power of appointment is confided to the President and Senate *jointly*, and can therefore only be exercised during the session of the Senate; but as it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen in *their recess*, which it might be necessary for the public service to fill without delay, the succeeding clause is evidently intended to authorise the President *singly*, to make temporary appointments. . . ."

Federalist 67, at 409-10.

Hamilton clearly uses "their recess" here to mean the time between legislative sessions. He adopts the linguistic convention noted above of identifying two distinct periods: when the Senate is "in session" and when it is "in . . . recess." Accordingly, he indicates that the need for presidential appointments "in their recess" arises when the Senate is not "in session" because when the Senate is "in session," the joint appointment power can be exercised. Because the Framers expected the "recess" (meaning the intersession break) to be a long period, it makes sense that they would establish a special appointments process for such a period. Even though the Framers were, as Hamilton said, committed to the advice-and-consent procedure for most appointments as a "check" on the President, see *Federalist 76*, at 457, they thought the special problem of the likely long intersession breaks called for an alternative approach.

Petitioner offers no reason why the Framers would have used "the Recess" to mean any break in legislative business. Intrasession breaks were not expected to be of great duration, so there would be no need to establish a special rule for appointments. That offices might be vacant for temporary periods was a necessary consequence of the Appointments Clause, which might leave vacancies unfilled even when the Senate was conducting business because the President and Senate could not agree on a nominee or the Senate had more pressing matters to attend. See Rappaport, 52 UCLA L. Rev. at 1562 ("While it is understandable that the Framers would have allowed the President to bypass the Senate to prevent a position from being vacant during a six- or nine-month recess, it seems absurd to imagine that the Framers would have allowed recess appointments to prevent an office from being vacant for only a week or two.").

C. Other Provisions of the Constitution's Text Show that "the Recess" Means Only Intersession Breaks.

Other provisions of the Constitution indicate that "the Recess" refers only to the period between sessions. First, the Constitution uses another word, "Adjournment," to refer to all breaks in legislative business. The terms "Adjournment" or "adjourn" appear in five constitutional clauses: the Presentment Clause, Art. I, § 7, cl. 2; the Three-Day Adjournment Clause, Art. I, § 5, cl. 4; the Presidential Adjournment Clause, Art. II, § 3; the Orders Presentment Clause, Art. I, § 7, cl. 3; and the Day-to-Day Adjournment Clause, Art. I, § 5, cl. 1. Each clause uses "adjourn" or "Adjournment" to mean both intrasession and intersession breaks in legislative business. See Rappaport, 52 UCLA L. Rev. at 1557-61. Had the Framers meant the Recess

Appointments Clause to include both intersession and intrasession breaks, they could have expressed this by giving the President power to make unilateral appointments "during an Adjournment of the Senate."

In contrast, the Constitution uses "the Recess" twice—in the Recess Appointments Clause and in the Senate Vacancies Clause, which, as discussed above, allowed a state's executive to fill a Senate vacancy "during the Recess of the Legislature of [the] State." Art. I, § 3, cl. 2. The choice to use different language ("the Recess" rather than "Adjournment") indicates a different meaning. The most obvious explanation is that "the Recess" had a narrower meaning encompassing only the expected longer (and, from an appointments standpoint, more problematic) break between sessions.

A second textual indication of the meaning of "the Recess" is the length of recess appointments. Recess appointments last until "the End of [the Senate's] next Session." Art. II, § 2, cl. 3. Interpreting "the Recess" to mean the break between sessions fits perfectly with this provision and with the primacy of the Appointments Clause's advice-and-consent method. By limiting a recess appointment's duration to "the End of [the Senate's] next Session," the Framers addressed the problem of unfilled vacancies during anticipated long intersession breaks while providing an opportunity for the advice-and-consent method to proceed once the Senate's new session began. Moreover, pairing "the Recess" and "their next Session" further implies that the Framers understood the Senate would be either "in recess" or "in session."

If "Recess" instead meant any break in legislative business, a recess appointment would last from the date of the appointment, through the end of the

current session, through the intersession recess, and through the entire subsequent session. This arrangement is implausible. There would be no reason to have the appointment last until the end of the *next* session, rather than until the end of the existing session.[9]

D. Alternate Definitions of "the Recess" for Constitutional Purposes are Untenable.

As noted, eighteenth-century language also used the word "recess" generically to refer to any break, no matter how short, in legislative business. See Johnson, *Dictionary of the English Language* (defining "recess" as "remission of suspension of any procedure"); Pet. Br. 13-16 (giving further examples). This broader meaning, however, is untenable in the context of the Recess Appointments Clause because it would give the President power to make recess appointments even during Senate breaks as short as a day. See *Noel Canning*, 705 F.3d at 503. There was no reason to provide the President with unilateral appointments power if an office becomes vacant during a very brief break in legislative business. Indeed, coupled with Petitioner's reading of "happen" to mean "exist," this interpretation of "the Recess" would allow the President effectively to bypass Senate approval altogether: the President could unilaterally fill every vacancy that existed during any such short break.

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[9] As noted, intrasession breaks were typically much shorter than intersession breaks, so it is especially implausible to provide for intrasession appointments lasting so much longer than intersession appointments.

Petitioner appears to argue that because *sometimes* an intrasession break could be long enough to make unilateral presidential appointments plausible, all intrasession breaks should be sufficient to potentially trigger the recess appointments power. See Pet. Br. 14-19. However, had the Framers wanted to provide for the case of *long* intrasession breaks, it is unlikely that they would have used a phrase that referred to any break.

Apparently recognizing the absurdity of defining "Recess" to include *any* break in legislative business, in the past the Executive Branch has suggested that the Recess Appointments Clause is triggered only when "in a *practical* sense" the Senate is unavailable to provide advice and consent, without settling on how long a break that might be. See 33 Op. Att'y Gen. 20, 24-25 (1921) (opinion of Attorney General Harry Daugherty) (suggesting that breaks of more than ten days might trigger the recess appointments power but ten days or less would not); see also Pet. Br. 18 (indicating that "the Executive has long understood that [intrasession breaks of three days or less]—which do not genuinely render the Senate unavailable to provide advice and consent—are effectively de minimus and do not trigger the President's recess-appointment authority"). This suggestion, however, has no support in constitutional text, structure, or purpose.

First, there is no eighteenth-century evidence of "recess" having the intermediate meaning the Executive Branch has proposed, and Petitioner does not provide any here. As indicated above, "recess" meant either (generically) any suspension of business or (specifically) the break between legislative sessions; it did not have a meaning directly linked to the length of the break.

Further, the standard of "practical unavailability" is hopelessly indeterminate and is not judicially administrable. Under this approach, there is no clear way to distinguish between legislative breaks that are long enough to count as recesses and those that are not. Petitioner advances no way to make such a distinction, nor does Executive Branch practice reflect one.[10] Although some Executive Branch interpretations have suggested that breaks of longer than ten (or perhaps only three) days may trigger the President's recess appointments power, it is hard to believe that such vacancies would have been considered so intolerable as to justify an exception to the Senate's advice-and-consent function. Vacancies of this duration, or even much longer, might well exist when the Senate was conducting other business, or while the President and the Senate came to an agreement on a nominee.

The extreme vagueness of the "practical unavailability" interpretation makes it unlikely that the Framers would have employed it. See Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 Mich. L. Rev. 239, 306-09 (1989) (noting the Framers' desire "to avoid vagueness and imprecision in the Constitution"); *Noel Canning*, 705 F.3d at 504. In particular, uncertainty over whether a recess had occurred—and therefore whether a valid recess appointment could be made—could cast doubt on the validity of a recess appointee's acts. This uncertainty

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[10] Doughtery's opinion observes (contrary to existing Executive practice) "[n]or do I think an adjournment for 5 or even 10 [days] can be said to constitute the recess intended by the Constitution," while ultimately concluding that "[i]n the very nature of things the line of demarcation cannot be accurately drawn." 33 Op. Att'y Gen. 20, 24-25.

is exemplified by Petitioner's inability to identify fixed time limits in an alternate definition of "the Recess." It is much more plausible that "the Recess" was understood, in accordance with its eighteenth-century meaning, as the readily identifiable intersession break. That meaning provided certainty as to when recess appointments would be proper through a clear, judicially administrable line, thus assuring that the recess appointments power would not displace the ordinary requirement of Senate consent while covering the most likely periods of long Senate unavailability. See Rappaport, 52 UCLA L. Rev. at 1552-56, 1563-64.

CONCLUSION

In sum, the original meaning of the Recess Appointments Clause is that the President may make recess appointments only when a vacancy arises between sessions of the Senate. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL R. DEVITT
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
SUPREME COURT CLINIC
5998 Alcala Park
San Diego, CA 92110
(619) 260-2992
mdevitt@sandiego.edu

MICHAEL D. RAMSEY
Counsel of Record
UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
5998 Alcala Park
San Diego, CA 92110
(619) 260-4145
mramsey@sandiego.edu

November 25, 2013

APPENDIX

APPENDIX A

LIST OF *AMICI CURIAE*

The following *amici curiae* join this brief. Positions and institutions are for identification only.

Randy E. Barnett is Carmack Waterhouse Professor of Legal Theory at Georgetown University Law Center and Director, Georgetown Center for the Constitution.

Christopher R. Green is Associate Professor of Law and H.L.A. Hart Scholar in Law and Philosophy at the University of Mississippi School of Law.

Gary Lawson is Philip S. Beck Professor of Law at Boston University School of Law.

John O. McGinnis is George C. Dix Professor in Constitutional Law at Northwestern University School of Law.

Michael D. Ramsey is Hugh and Hazel Darling Foundation Professor of Law at the University of San Diego School of Law.

Michael B. Rappaport is Hugh and Hazel Darling Foundation Professor of Law and Director of the Center for the Study of Constitutional Originalism at the University of San Diego School of Law.

Todd J. Zywicki is GMU Foundation Professor of Law at George Mason University School of Law.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-1281

[illegible]

In The
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION
OF THE NOEL CORP.,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The District Of Columbia Circuit**

BRIEF OF POLITICAL SCIENTISTS AND HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

NELSON LUND
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
3301 Fairfax Drive
Arlington, Virginia 22201

AMANDA M. BRUNO
VANESSA R. BROWN
MORGAN, LEWIS &
BOCKIUS LLP
1701 Market Street
Philadelphia, Pennsylvania
19103

ALLYSON N. HO
Counsel of Record
JOHN C. SULLIVAN
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
214.466.4000
aho@morganlewis.com

W. BRAD NES
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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QUESTIONS PRESENTED

The Recess Appointments Clause of the Constitution provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, cl. 3. The questions presented are:

1. Whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between sessions of the Senate.

2. Whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess.

3. Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro-forma sessions.

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INTEREST OF *AMICI CURIAE*

Amici are academics, political scientists, and historians who focus their work on understanding the Constitution of the United States and conveying its meaning and underpinnings to students, fellow academics, and the courts.[1] These *amici* focus their work on the original understanding of the Constitution at the time of the founding and write books and articles that draw attention to that meaning. This allows judges and litigators to wrestle with an understanding of the document as adopted—the meaning that secures the text's legitimacy as fundamental law.

Hadley P. Arkes is the Edward N. Ney Professor of Jurisprudence and American Institutions at Amherst University and the Director of The James Wilson Institute on Natural Rights and the American Founding. He received his B.A. at the University of Illinois and a Ph.D. from the University of Chicago. Professor Arkes has written numerous books and articles addressing the American founding and been called upon to testify before Congress on multiple occasions.

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[1] Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation or submission of this brief. *Amici* file this brief with the written consent from all parties, copies of which are on file in the Clerk's Office. All parties received timely notice of the professors' intention to file this brief.

Joseph M. Bessette is the Alice Tweed Tuohy Professor of Government and Ethics at Claremont McKenna College. He has a B.S. from Boston College and an M.A. and Ph.D. from the University of Chicago. Professor Bessette served as both a Deputy Director (1985-1988) and an Acting Director (1988-1990) in the U.S. Department of Justice. His expertise covers the Presidency and American Constitutionalism and his publications include *Executive Power and the American Founding* in SEPARATION OF POWERS AND GOOD GOVERNMENT (1994) and editing THE PRESIDENCY IN THE CONSTITUTIONAL ORDER: AN HISTORICAL EXAMINATION (2010) AND THE CONSTITUTIONAL PRESIDENCY (2009).

David F. Forte is Professor of Law at Cleveland State University and the inaugural holder of the Charles R. Emrick, Jr.—Calfee Halter & Griswold Endowed Chair. He holds a Ph.D. from the University of Toronto and a J.D. from Columbia University. Professor Forte previously served as chief counsel to the United States delegation to the United Nations and alternate delegate to the Security Council. Professor Forte is widely published in the areas of constitutional law and history. He is also Senior Editor of THE HERITAGE GUIDE TO THE CONSTITUTION (2006), a clause-by-clause analysis of the Constitution of the United States.

Nelson Lund is University Professor at George Mason University School of Law. He holds a Ph.D. in political science from Harvard University and a J.D. from the University of Chicago. He has published widely in the field of constitutional law and

constitutional history. Before becoming a professor, he served in the United States Department of Justice in the Office of the Solicitor General (1985) and the Office of Legal Counsel (1986-1987), and as Associate Counsel to the President (1989-1992).

Jeremy A. Rabkin is Professor of Law at George Mason University School of Law. He graduated from Cornell University with a B.A. and received his Ph.D. from Harvard University. Professor Rabkin serves on the Board of Directors of the U.S. Institute of Peace and is familiar with the appointments process; he was originally appointed by President George W. Bush in 2007, and then appointed for a second term by President Barack Obama and reconfirmed by the Senate in 2011. Professor Rabkin specializes in early constitutional history and his articles have appeared in major law reviews and political science journals.

Ralph A. Rossum is the Salvatori Professor of Political Philosophy and American Constitutionalism at Claremont McKenna College. Professor Rossum serves as an editor for many publications and is annually recognized in both Who's Who in America and Who's Who in the World. He received his B.A. (summa cum laude) from Concordia College and his M.A. and Ph.D. from the University of Chicago. Professor Rossum focuses on the American Founding and American Constitutionalism. He has written numerous books and articles on the Constitution, including UNDERSTANDING CLARENCE THOMAS: THE JURISPRUDENCE OF CONSTITUTIONAL RESTORATION

(forthcoming 2014), ANTONIN SCALIA'S JURISPRUDENCE: TEXT AND TRADITION (2006), THE AMERICAN FOUNDING: POLITICS, STATESMANSHIP, AND THE CONSTITUTION (1981), and multiple volumes of the casebook AMERICAN CONSTITUTIONAL LAW.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Recess Appointments Clause does not permit the unilateral appointments to the NLRB made by the President in this case. Those appointments—made during a three-day "intra-session" break when the Senate was meeting *pro forma*—are unique in the history of the Republic. They are also the culmination of unnecessary and inappropriate Executive overreaching. This overreaching has undermined a valuable Senate prerogative in a manner unfathomable to the Founders and inconsistent with the design of the Constitution.

The primary purpose of this brief is to show that adhering to the original meaning of the Recess Appointments Clause has not and will not disrupt the orderly governance of the Nation. The constitutionally prescribed modes of appointment worked perfectly well for a very long time, and modern circumstances make it even easier to continue using the Constitution's procedures. Whether the clear text, structure, purpose, and history of the Constitution should give way to "practical" considerations of the modern

administrative state therefore cannot even be considered an issue in this case.

Notwithstanding a few relatively minor deviations from the constitutional design, Presidents throughout the first 160 years of our Nation's history largely, and certainly without insurmountable difficulties, adhered to the textual and structural confines of the Appointments Clause and the Recess Appointments Clause with which it is closely related. Their ability to abide by the Constitution, even in sometimes very difficult situations, provides a ready model for exercising the Presidential-appointment power today.

ARGUMENT

The National Labor Relations Board (NLRB) invites this Court to sanction an unprecedented expansion of the President's recess-appointments power. The Court should decline that invitation for several reasons.[2]

[2] The D.C. Circuit concluded, primarily for textual reasons, that both the vacancy and the appointment must take place between the adjournment *sine die* (signaling the end of a Session) and the beginning of the next Session. Pet. App. 51a-52a. The two textual cues on which the D.C. Circuit focused are "the Recess"—an apparent singling out of the one "inter-session" recess—and "happen"—indicating that the vacancy must also come about during the recess. *Amici* will not address those rulings in detail because the parties (and no doubt other *amici*) will do so extensively.

First, the expansion is impermissible, *inter alia*, because of the importance of maintaining the structural checks imposed by the general Appointments Clause. Second, historical practice—even considering the recent expansion of the President's recess-appointment power that has accelerated over the last 30 years—further illustrates that the appointments in question were *ultra vires*. Third, comparisons of historical and current practice underscore that concerns about the practicality of enforcing the original limits on the recess-appointment power—to the extent such concerns may even be relevant—are entirely misplaced. Enforcing the Recess Appointments Clause as written and as the Founders intended will hardly lead to a crisis in government. To the contrary, Presidents successfully governed under those constraints for the bulk of our Nation's history—and, if anything, could more easily do so today.

I. The Structure Of The Constitution Demonstrates That The President's Intra-Session Recess Appointments Were Unconstitutional

The Appointments Clause provides that the President "shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint * * * Officers of the United States." U.S. CONST. art. II, § 2, cl. 2. The Recess Appointments Clause, in contrast, simply allows the President to "fill up all Vacancies that may happen during the Recess of the Senate." U.S. CONST. art. II, § 2, cl. 3. The Appointments

Clause is the rule. The Recess Appointments Clause is the exception. The exception was used here merely to circumvent the rule.

A. The Recess Appointments Clause Must Be Read Together With The Appointments Clause

The NLRB's request for an exceedingly broad construction of the Recess Appointments Clause focuses extensively on the exception to the rule without confronting the rule itself. Pet. Br. 7, 19-20. But the Recess Appointments Clause cannot be understood outside the larger context of appointments generally. U.S. CONST. art. II, § 2, cl. 2, 3. The Recess Appointments Clause immediately follows the general Appointments Clause in the Constitution as a narrow alternative to the generally prescribed method, not as a separate track for political nominees whom the President does not wish to put before the Senate.

B. The Appointments Clause Restrains The Executive From Exercising Unfettered Power Over Appointments

Throughout the Constitutional Convention, the Framers sought to provide the government with sufficient energy to deal with national concerns, but, at the same time, they devised a number of checks to limit the possibility of governmental corruption, self-dealing, and favoritism. The Framers showed

particular concern with Executive abuses in the appointments process. See, e.g., Luther Martin, *Genuine Information*, MARYLAND GAZETTE, Jan. 29, 1788, *reprinted in* FEDERALISTS AND ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION 90 (John P. Kaminski and Richard Leffler eds., 1998) ("[T]he person who *nominates*, will always in reality *appoint*, and that this was giving the president a power and influence which together with the other powers, bestowed upon him, would place him above all restraint and controul."). Thus understandably, they immediately rejected a proposal during the Constitutional Convention to provide the appointment power to the President alone. Adam J. White, *Toward the Framers' Understanding of "Advice and Consent": A Historical and Textual Inquiry*, 29 HARV. J. L. & PUB. POL'Y 103, 116 (2005) ("First, they voted on vesting the appointment power solely in the Executive. The motion failed.").

The Appointments Clause alleviated concerns over Executive abuse by reining in Executive power in appointments. The Framers settled on a system where the President selected officials who were nonetheless subject to senatorial confirmation. Michael A. Carrier, Note, *When Is the Senate in Recess for Purposes of the Recess Appointments Clause?* 92 MICH. L. REV. 2204, 2225 (1993) (noting "[t]he Framers heatedly debated the general power of appointment" and "voiced great distrust of the executive and expressed the need for checks and balances to counteract the power of the President"). Alexander

Hamilton explained in THE FEDERALIST NO. 76 that the purpose of requiring the Senate's advice and consent is that "the necessity of their concurrence would have a powerful, though, in general, a silent operation" in that it would be "an excellent check upon a spirit of favoritism" of the President. THE FEDERALIST NO. 76, at 456 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Structurally, appointments were never intended to be a unilateral endeavor. The Constitution explicitly "confided to the President and Senate *jointly*" the power of appointment. THE FEDERALIST NO. 67, at 408 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original). In penning that description, Hamilton was responding to Anti-Federalists who claimed that the appointment power would lead to abuse. *Id.* at 405 ("There is hardly any part of the system which could have been attended with greater difficulty in the arrangement of it than this; and there is, perhaps, none which has been inveighed against with less candor or criticized with less judgment."). His goal was to highlight a limitation on Executive power. If the Senate appears to some Presidents as "obstructionist" on appointments at times, that was the point.

C. The Recess Appointments Clause Is A Narrow Exception Originally Designed For Temporary Appointments Necessitated By Extremely Lengthy Delays Between Congressional Sessions

The Recess Appointments Clause was designed as a narrow exception to regular appointments to address the specific problem of lengthy recesses between sessions at the Founding. *Id.* at 408 ("[A]s it would have been improper to oblige this body to be continually in session for the appointment of officers, and as vacancies might happen *in their recess*, * * * the succeeding clause is evidently intended to authorize the President, *singly*, to make temporary appointments 'during the recess of the Senate, by granting commissions which shall expire at the end of their next session.'" (emphasis in original)). In the early years under the Constitution, the nature of the country and the technology of the time made travel and communication difficult. "[I]ntersession recesses typically lasted between six and nine months and therefore recess appointments were needed to prevent important offices from remaining unfilled during these long periods." Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. REV. 1487, 1491 (2004) (hereinafter Rappaport, *Original Meaning*).

This exception to the appointment process was never intended to swallow the rule. Significantly, the Framers adopted the Recess Appointments Clause without debate. Carrier, 92 MICH. L. REV. at 2225.

In contrast, the general Appointments Clause was the subject of intense scrutiny during the public debates over ratification. Alexander Hamilton responded directly to its critics who charged that the President had unchecked appointment powers, countering that "writers against the Constitution" tend to "misrepresent[ ]" such powers in order to prey on "the aversion of the people to monarchy * * * * *" FEDERALIST NO. 67, at 405.

Hamilton went on to explain that "[t]he relation in which [the Recess Appointments] clause stands to the [Appointments Clause], which declares the *general mode* of appointing officers of the United States, denotes it to be *nothing more than a supplement* to the other for the purpose of establishing *an auxiliary* method of appointment, in cases to which the general method was inadequate." *Id.* at 408 (emphasis added). Hamilton made clear that the Recess Appointments Clause "is to be considered as supplementary" to the Appointments Clause. *Ibid.*

Debates over the Senate's role in advising and consenting to Presidential nominees remained an important, unresolved issue even after ratification. The First Congress debated vigorously whether the President had the power to remove a Presidential appointee without the Senate's consent. The Senate "jealously guarded its prerogatives" and "[m]any senators simply assumed that because they consented to the appointment of executive officers they likewise had to consent to their removal." GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC,

1789-1815, 87-88 (2009). "The Senate was evenly divided on the issue; only after Vice-President Adams's tie-breaking vote did it concede the *right of the* president to remove executive officials without its advice and *consent*." *Ibid.* (emphasis added).

In this historical context of vigorous debate over the necessity and scope of the general Appointments Clause, it is unimaginable that the Framers would have enacted the Recess Appointments Clause—without any debate—while simultaneously intending that it provide an enormously broad grant to the President to evade the advice-and-consent requirement. That scenario would have run counter to the very purpose of the Appointments Clause.

II. The NLRB Appointments Are Fundamentally Inconsistent With Historical Practice

The history of Presidential exercise of the recess-appointments power does not support the NLRB appointments in this case. Far from it. Instead, it shows a long tradition of virtually uniform adherence to the original meaning of the Recess Appointments Clause—with Presidents regularly departing from that tradition only over the past 30 years or so.

A. Recess Appointments From 1789-1823: Strict Adherence To Original Meaning

During the founding era of the Republic, the original meaning of the Recess Appointments Clause,

informed by the Appointments Clause, controlled its use by the Executive Branch. Presidents used the recess-appointment power to fill vacancies that arose during the inter-session recess, and any recess appointments occurred during that time as well. This was confirmed by the earliest official opinion to be offered on the subject.

In 1792, the first Attorney General of the United States concluded that a vacancy occurred when Congress created a new office but that, since the vacancy arose during the session of Congress (not the recess), it could not be filled with a recess appointment. Edmund Randolph, *Opinion on Recess Appointments* (July 7, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON 165-67 (John Catanzariti et al. eds., 1990). The authoritativeness of Randolph's views is only enhanced by the role he played in drafting and ratifying the Constitution. President Washington relied upon Randolph's interpretation in making his own appointments, noting that the recess appointments he made were for "offices having become vacant since [the Senate's] last session." Exec. S. Journal, 2d Cong., 1st Sess. 86 (1791); see also *id.* at 38 (1790) (listing vacancies that occurred "during the late recess of the Senate").

Alexander Hamilton, too, wrote that "[i]t is clear * * * the President cannot fill a vacancy which happens during a session of the Senate." Letter from Alexander Hamilton to James McHenry (May 3, 1799), *in* 23 THE PAPERS OF ALEXANDER HAMILTON 94 (Harold C. Syrett ed., 1976). This confirmed his

previous position that the "auxiliary method of [recess] appointment" was available to the Executive only because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers [but] vacancies might happen *in their recess*, which it might be necessary for the public service to fill without delay." FEDERALIST NO. 67, at 408 (emphasis in original). At their inception, then, recess appointments were at most a stop-gap measure for dealing with narrow circumstances in which they are "necessary for the public service." As the language of the Constitution clearly implies, they were not understood to be tools for avoiding the advice-and-consent requirement whenever the President found that requirement inconvenient.

Indeed, early Presidents viewed Senate confirmation as an integral part of the vetting process itself—not something to circumvent. George Washington evidenced this in his first nomination after becoming President (as recorded in the Senate Executive Journal): William Short as a temporary replacement for Thomas Jefferson as Minister at the Court of France. Washington sent a letter to the Senate cordially requesting "advice on the propriety of appointing [Short]" and offering "papers which [would] acquaint [Senate members] with [Short's] character." Exec. S. Journal, 1st Cong., 1st Sess. 6 (1789).

And while the Senate regularly consented to Washington's nominations, it was not the "rubber stamp" one might imagine. One of President Washington's earliest nominees—Benjamin Fishbourn,

nominated for Naval Officer of the Port of Savannah—was rejected by the Senate even though he was someone about whom the President felt quite strongly. See *id.* at 16-17 (1789). In keeping with his understanding of the joint nature of appointments, Washington then sent a letter about Fishbourn, suggesting that the Senate permit him to provide further information moving forward in situations "where the propriety of nominations appear questionable to you." *Id.* at 16.

It is also clear that early Presidents did not use recess appointments to by-pass the Senate when consent would be lacking. When it came to recess appointments, Washington viewed them merely as a temporary measure that, if possible, would be permanently fixed as soon as the Senate was back in session. Thus in informing the Senate of the very first set of recess appointments in the Nation's history, President Washington was quick to point out that "[t]hese appointments will expire with your present session, and indeed *ought not to last longer than until others can be regularly made.*" *Id.* at 38 (1790) (emphasis added).

Between 1789 and 1823, Presidents Washington, Adams, Jefferson, Madison, and Monroe together made well over 4,000 recess appointments.[3] The

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[3] Unfortunately, it is impossible to compile a complete and wholly accurate record of recess appointments before 1965. See generally Carrier, 92 MICH. L. REV. at 2209 n.31. Between 1789 and 1823, for example, recess appointments were not recorded in

(Continued on following page)

Recess Appointments Clause was used only to fill vacancies that arose during an inter-session recess and no appointments were made during intra-session adjournments.[4]

The Madison Administration's use of recess appointments is particularly powerful historical evidence that enforcing the Recess Appointments Clause's limitations on Executive power will not lead to any breakdown in governance. President Madison faced an unprecedented challenge during the War of 1812—a conflict in which British troops not only occupied Washington, D.C., but also burned the

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the Senate Executive Journal unless the President chose to nominate the recess appointee for a regular appointment once the Senate was back in session. See, e.g., Exec. S. Journal, 2d Cong., 1st Sess. 66-67 (1791). Additionally, in the early years of the Republic, the President was occasionally ambiguous in his messages to Congress regarding recess appointments. Thus, while there are notices accompanying groups of nominations stating that certain recess appointments were made during the last recess of the Senate, it is not always clear whether all of the nominations in the group were given recess appointments. See, e.g., Exec. S. Journal, 3d Cong., 2d Sess. 164 (1794) ("I nominate the following persons to fill the offices respectively annexed to their names, some of which became vacant during the recess of the Senate.").

[4] The first intra-session break took place December 23-30, 1800, during the Second Session of the Sixth Congress. *2012 Congressional Directory* 522. During that break, President Adams made one nomination—Louis Tousard, to be Inspector of Artillery—on Christmas Eve, December 24th. Upon returning, the Senate treated it as a December 30th nomination and confirmed Tousard on December 31st. Exec. S. Journal, 6th Cong., 2d Sess. 364 (1800).

Executive Mansion and the Capitol. Nonetheless, Madison made all necessary appointments without using recess appointments while the Senate was in session. Madison made over 3,000 inter-session recess appointments, including more than 2,500 military appointments and promotions, and handled other appointments via advice and consent. See Exec. S. Journal, 11th Cong., 1st Sess. 123 (1809) through 18th Cong., 2d Sess. 71 (1817). Madison's example confirms that even under extraordinary circumstances, enforcing the original meaning of the Recess Appointments Clause is entirely consistent with the Executive's responding effectively to complex and demanding challenges.

B. Recess Appointments From 1823-1921: Positions Vacated Before The Recess

1. Rise Of The "Happen to Exist" Construction

The first shift away from the original meaning of the Recess Appointment Clause came in 1823 with an opinion by Attorney General William Wirt. Wirt was tasked with addressing when a vacancy must "happen" to come under the Recess Appointments Clause. From a textual standpoint, he admitted that the vacancy should "arise" during the recess. His opinion, however, was based on what he thought was required by the "reason and spirit" of the Constitution—and he concluded that the vacancy could be one that "happen[ed] to exist" during the recess. Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631, 632 (1823)

(hereinafter Wirt Op.). In Wirt's view, the vacancy could potentially arise at any point before the recess and still be eligible for Executive appointment without Senate confirmation—a perfect contradiction of Attorney General Randolph's opinion just 30 years earlier.

In the century after this first interpretive stretching of the Recess Appointments Clause, thousands of recess appointments were made to fill vacancies that occurred both during and before the recess of the Senate. Importantly, however, the recess-appointment power was still not used—with two notable exceptions discussed in the next section—to make appointments during intra-session adjournments.

In reality, though, it is unclear that the "happen to exist" interpretation offered by General Wirt was widely accepted over the "happen to arise" interpretation that previously governed. It appears to have been a disputed issue both at that time and for at least another century. For example, just two years after Wirt's opinion, the Senate considered a resolution:

> That the President of the United States does not, constitutionally, possess either the right or the power to appoint ambassadors, or other public ministers, but with the advice and consent of the Senate, except when vacancies may happen in the recess.

Exec. S. Journal, 19th Cong., 1st Sess. 467 (1825). The resolution's language is close to the text of the

Recess Appointments Clause itself, but the use of "***when*** vacancies may happen in the recess" (as opposed to "all Vacancies that may happen during the Recess") arguably points to the Senate continuing to subscribe to the "happen to arise" construction.

Further evidence of the disputed nature of General Wirt's interpretation may be seen in the first version of 5 U.S.C. § 5503—the statute limiting the conditions under which recess appointees may be paid—that was passed in 1863. The limitations it enforces make it "appear[ ] that this statute was enacted based on the Senate's view that the Constitution adopted the arise interpretation." Rappaport, *Original Meaning*, at 1543 n.173. A Senate report from that same Congress also defended the "arise" view. *Ibid.* As recently as 1940, Congress was still using this statute to implicitly rebut the presumption that recess appointments could be made to fill vacancies that occurred during a session of the Senate. Michael B. Rappaport, *Why Nonoriginalism Does Not Justify Departing from the Original Meaning of the Recess Appointments Clause*, SOC. SCI. RES. NETWORK (www.ssrn.com) (forthcoming late 2013) (hereinafter Rappaport, *Nonoriginalism*). Additionally, key Attorney General opinions throughout the Nineteenth Century and court cases in the 1860s strongly support the original "happen to arise" construction. *Ibid.*

Structurally, the shift from "happen to arise" to "happen to exist" may be less problematic than the Executive's later claim of a power to make

intra-session recess appointments. See Part II.C. *infra*. General Wirt argued that the "substantial purpose of the [C]onstitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed." Wirt Op. 632. True enough, but the Constitution was designed to protect the people from dubious appointments, not just to keep offices filled with whomever a President most prefers. That is why the Recess Appointments Clause was written to protect the normal advice-and-consent requirement of the Appointments Clause.

That said, Wirt's "happen to exist" interpretation at least seems to involve less of a purposeful dodge of Senate confirmation than making recess appointments while the Senate is still very much in session. Nevertheless, straying from the constitutional text in this respect only made it that much easier for later Presidents to expand the recess-appointment power well beyond textual, structural, and historical bounds—culminating in the unprecedented appointments at issue in this case.

2. Continued Rejection Of Intra-Session Recess Appointments

Even while the meaning of "happen" was being debated, recess appointments continued to be made only during inter-session recesses. The two exceptions that prove the rule also occurred during this period.

First are President Johnson's 1867-1868 recess appointments during extended intra-session breaks of the Senate. Although Johnson's appointments run contrary to the text, original meaning, and purpose of the Clause, they should be viewed as anomalies rather than any sort of general shift in the separation-of-powers firmament. Indeed, they are *sui generis* in the first 130 years of the Republic.

In 1867, Congress was in session from March 4th until December 1st but took a two-and-a-half month break from late April to early July and a four-month break from late July to late November. Congress followed a similar schedule the next year, taking several longer intra-session breaks. Before that time, however, Congress had only taken eleven intra-session breaks of more than three days in the entire history of the Nation. Each break occurred around Christmas time and none was longer than a few weeks.

The "intra-session" breaks taken by the 40th Congress likely appeared to President Johnson as actual recesses of the Senate. Indeed, the first of the lengthy intra-session adjournments began when a Special Session, called during April of 1867, adjourned *sine die*, the normal signal for the end of a congressional session. Additionally, after Johnson's impeachment and trial in 1868, the president pro tempore used language to begin an adjournment that sounded like the language normally used to end a session. Rappaport, *Nonoriginalism*.

This also explains Johnson's actions with regard to Secretary of War Edwin Stanton. Indeed, one of the articles on which President Johnson was impeached dealt with his treatment of Stanton. See Article I, Proceedings of the Senate Sitting for the Trial of Andrew Johnson.[5] President Johnson suspended Stanton during Congress's second long adjournment of 1867. But according to a provision of the Tenure of Office Act—a law designed specifically to protect Stanton—the President could only suspend cabinet members without congressional approval when Congress was out of session. Tenure of Office Act, 14 Stat. 430 (1867). Johnson later removed Stanton from office so that he could challenge the constitutionality of the Act. Although the second long break in 1867 did not begin with "session-ending" language, Johnson's actions—i.e., suspending Stanton and recess-appointing William Gould as paymaster of the Army—may simply signal that Johnson viewed the unusual breaks taking place during those years as inter-session recesses.[6]

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[5] *Available at* http://www.nps.gov/anjo/historyculture/article-i.htm.

[6] Johnson made the appointment during the second long break without reference to the adjournment being intra-session. The Court of Claims later held that Gould had been validly appointed during what it called an intra-session recess. *Gould* v. *United States*, 19 Ct. Cl. 593 (1884). That language, however, was admittedly dicta, *id.* at 596, and Attorney General Knox later concluded that Gould's appointment should not be taken as precedential. President—Appointment of Officers—Holiday Recess, 23 Op. Att'y Gen. 599, 602-03 (1901).

Perhaps the strongest reason for treating Johnson's recess appointments as anomalous is that there is no indication that anyone debated the constitutionality of the appointments at that time—and that is striking when one considers the hostilities that were taking place between Congress and the President.

The unusual nature of President Johnson's appointments was not addressed until 30 years later when Attorney General Philander Knox considered the question of intra-session recess appointments in 1901. He stated simply that "[t]he public circumstances surrounding [the 1867-1868] state of affairs were unusual and involved results which should not be viewed as precedents." 23 Op. Att'y Gen. at 603. In General Knox's view, the appointments were contrary to both "the uniform practice of the Executive and the various opinions of [his] predecessors." *Ibid.* General Knox highlighted the difference in the Constitution between "the Recess" and an intra-session "adjournment" in setting forth the "irresistible" conclusion that "the President is not authorized" to make an intra-session appointment. *Id.* at 604. Furthermore, he confirmed that "[a]ny immediate temporary adjournment is not [a constitutional] recess, although it may be a recess in the general and ordinary use of that term." *Id.* at 601.

The second set of exceptions that prove the rule are President Theodore Roosevelt's on December 7, 1903. The Senate ended a special session that day and then immediately began a regular session. President Roosevelt caused a good deal of controversy

by claiming that the very short period of time between the two sessions amounted to a "constructive recess" and making recess appointments based on that assumption. *The Infinitesimal Recess*, N.Y. TIMES, Dec. 8, 1903, at 8. His actions prompted the Senate Judiciary Committee to prepare a report on what constitutes a recess of the Senate in which it soundly rejected any notion of a "constructive recess." S. Rep. No. 4389, 58th Cong., 3d Sess., *reprinted in* 39 Cong. Rec. 3823, 3824 (1905). It is not only the immediate backlash to his actions, though, that show how political actors interpreted the Recess Appointments Clause at that time. It is also the fact that President Roosevelt at least evidenced a regard for the understood meaning of the rule in his formalistic attempt to dodge the textual mandate by styling the break as a "constructive recess." One thing remained clear: intra-session recess appointments were anathema.

C. Recess Appointments From 1921-2012: The Executive's Shift Toward Intra-Session Recess Appointments

After 132 years of settled opinion on the matter, Attorney General Harry Daughtery adopted a novel interpretation of the Recess Appointments Clause in 1921, advocating a "practical" interpretation of "recess." Contrary to General Knox's earlier opinion, Daughtery interpreted the 1905 Senate report to conclude that advice and consent need not be obtained when the Senate is "absent so that it cannot

receive communications from the President or participate as a body in making appointments." Executive Power—Recess Appointments, 33 Op. Att'y Gen. 20, 25 (1921). While the Senate had appeared to indicate that functional inability to respond to the President was a necessary condition for a recess, Daughtery appeared to take it as a sufficient one. Thus for the first time in the Nation's history, there was a legal opinion suggesting Presidents might make "intra-session recess appointments" if the Senate took an extended break.[7]

But with the exception of President Harding's four appointments in reliance on the Daughtery opinion, the practice of recess appointments did not change significantly until many years later.[8]

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[7] It is possible that Daughtery may actually have been arguing for a "modified intersession" recess in which any lengthy period during which the Senate cannot offer advice and consent becomes a functional intersession recess. Understanding those long breaks as legitimate recesses, much as it seems President Johnson interpreted Congress's actions in 1867-1868, would be supported by the length that the recess appointee stayed in office. In the years following Daughtery's opinion, the recess appointment would only last until the end of the session when the Senate returned, not the end of some future session. This lends credence to the idea that both the Executive Branch and Congress viewed these "intra-session" appointments, Pet. Br. at 9a-12a, as "inter-session" even though there was no *sine die* adjournment. Rappaport, *Nonoriginalism*.

[8] Even Daughtery concluded that no one would think a two- or three-day adjournment constituted a practical recess. In fact, he thought a break of even five to ten days would probably not meet the "practical" test he invented. 33 Op. Att'y Gen. at 25.

In 1928, President Coolidge did appoint John Esch as commissioner of the Interstate Commerce Commission during a 13-day recess.[9] Notably, the Senate rejected Esch's nomination during the following session and his commission ended at the end of the formal session—an indication that the adjournment during which Esch was appointed was treated as an inter-session recess. Clarence A. Miller, *The Interstate Commerce Commissioners: The First Fifty Years*: *1887-1937*, 5 GEO. WASH. L. REV. 580, 665 (1936).

Thus from 1789 to the 1940s, there were virtually no intra-session recess appointments, and the few that were made each had unusual facts: (1) Johnson's during the controversies of 1867-1868; (2) Harding's short appointments in 1921 that were quickly confirmed; and (3) Coolidge's appointment of Esch and Hoover's promotions and appointments, which appear to have been viewed as inter-session appointments.

It was not until 1947 that Presidents began making intra-session recess appointments with more regularity. President Truman made 20 recess appointments over four intra-session adjournments.

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[9] Several officers received promotions—technically these are new appointments—under President Hoover, and he also made some appointments to the Federal Farm Board in 1929. These appointments, however, took place during a special Executive-called session and so might also have been considered to be outside the normal session of Congress. If so, it was functionally an inter-session recess.

President Eisenhower followed his lead, making nine appointments during intra-session adjournments. President Nixon made eight such appointments, President Carter made 17, and President Reagan made 73. Presidents since Reagan have made intra-session recess appointments with more or less frequency.

Importantly, however, there has been no congressional acquiescence in this practice. On the contrary, Congress has attempted to rein in Presidents' ultra vires exercise of the recess-appointment power by taking such steps as limiting the circumstances under which appointees get paid and using *pro forma* sessions to block appointments. On the whole, the Senate appears zealous—and indeed part of Petitioners' argument is that the Senate is too zealous—to guard its advice and consent role.

In 1823, Attorney General Wirt—who presided over the first expansion of the Clause—speculated that the exception would swallow the rule only if one "imput[ed] to the President a degree of turpitude entirely inconsistent with the character which his office implies." Wirt Op. 634. Wirt was mistaken. The acceleration in intra-session recess appointments over the last 30 years shows the need, instead, to heed Madison's admonition: "If men were angels, no government would be necessary * * * * [But] in framing a government which is to be administered by men over men, the great difficulty lies in * * * oblig[ing] it

to control itself." THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961).

The appointments at issue here—made during *pro forma* sessions of the Senate—although unprecedented, are nonetheless symptomatic of the expansion of the recess-appointments power that has primarily occurred over the past 30 years. Seizing upon the language of the Daughtery opinion, the Office of Legal Counsel informed President Obama in early 2012 that "the convening of periodic *pro forma* sessions in which no business is to be conducted does not have the legal effect of interrupting an intrasession recess otherwise long enough to qualify as a 'Recess of the Senate' under the Recess Appointments Clause." Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, ___ Op. O.L.C. ___, 2012 WL 168645, at *19 (Jan. 6, 2012) (hereinafter OLC Memo).

Pro forma sessions have been historically understood to defeat recess appointments. Henry B. Hogue, *Recess Appointments: Frequently Asked Questions*, Congressional Research Service, 10 (Jan. 9, 2012) (noting the Senate's use of its power to "determine the Rules of its Proceedings"—under Article I, § 5, clause 2 of the Constitution—to conduct *pro forma* sessions that would frustrate President George W. Bush's use of the recess-appointments power). Congress is in session and, therefore, neither

chamber can be absent for more than three days without the consent of the other.[10]

Acting on the advice of the OLC Memo, President Obama made recess appointments during one of the three-day *pro forma* sessions. Thus for the first time in the Nation's history, a President made intra-session recess appointments even though the Senate was "in session" in a manner that made the members of Congress believe the Adjournments Clause was satisfied.

III. History Confirms That Adhering To The Original Meaning Of The Recess Appointments Clause Is No Barrier To Good Governance

This Court has repeatedly explained that the original meaning of the Constitution at the time of ratification is the guide for its interpretation today. *District of Columbia* v. *Heller*, 554 U.S. 570, 634-35 (2008) ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them."); *Rhode Island* v. *Massachusetts*, 37 U.S. 657, 721 (1838) (recognizing that the meaning of

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[10] In this instance, Senate leaders asked the House to prevent the appointments by not agreeing to the Senate's adjournment. This did not allow for an amount of time to pass that would traditionally be understood as long enough to count as a functional recess. Pet. Br. 56. The appointments here were thus unprecedented even under Petitioners' theory of recess appointments.

the Constitution "must necessarily depend on the words of the constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions * * * in the several states").

Some have objected, however, that fidelity to original meaning must yield to the exigencies of a changing world. See, e.g., DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010). In the instant case, however, that debate is beside the point. If anything, it is even easier today for the Executive to operate within the constitutional constraints imposed by the Founders than it was in earlier times. Even then, Presidents managed to govern effectively within those constraints—sometimes under trying circumstances, as discussed above. And not a single one of the Executive departures from the Constitution's requirements can plausibly be seen as necessary for the public good.

To be sure, in the modern administrative state, the number of political appointments requiring Senate confirmation has increased. But at the Founding, too, Presidents were responsible for an exceedingly large number of appointments—and still managed to make them when the Senate was in session (under the Appointments Clause) or between sessions when a vacancy arose (under the Recess Appointments Clause). President Washington, for example, appointed numerous ensigns and other low-level officers

with which a modern President is not concerned.[11] The process was streamlined for Washington by the Secretary of War presenting Washington with long lists of officer nominations that could then be offered to the Senate for consideration without much effort. Even so, the appointments were not left solely to Executive Branch discretion—not all of the streamlined nominations were approved. See Part II.A. *supra*.

To allow modern Presidents to do an end-run around the original meaning of the Appointments Clause (and thus to evade its constraints) threatens the very dangers that concerned the Founders and that consumed the ratification debates. And it is unnecessary besides. If anything, there is even less reason today than at the Founding to be concerned with the workability of enforcing the limits reasonably imposed by the Founders on the President's recess-appointment power.

First and foremost, it is simply much easier in our time to convene the Senate. Today's Senate meets regularly and can reconvene on very short notice if necessary. Furthermore, the Secretary of the Senate can receive messages concerning nominations from the President at any point during a Congress and deal with them appropriately. See, e.g., 149 Cong. Rec. S8 (Jan. 7, 2003). If it was unnecessary

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[11] See 10 U.S.C. § 624 (allowing O1-O3 commissions to operate outside the advice and consent of the Senate).

for President Adams to recess appoint his nominee during the first intra-session break in the Senate's history—when the Senate could not be called upon for advice and consent—it is unnecessary for a modern nomination to be forced through when the Senate could be called upon to act. The nominee can easily be considered upon the Senate's return. See note 4 *supra*.

Second, the Senate's vetting process can be expedited considerably in the modern age because candidates can be available by telephone or email in an instant, and can usually interview in person almost immediately. Nominations must simply be made far enough in advance to ensure a hearing while the Senate is in session (or non-controversial enough to be expedited quickly near the end of a session). Indeed, the current Administration has already selected a nominee to fill a U.S. District Court position in Maryland even though that position will not be vacant until February of next year.[12] But vacancies can languish for extended periods before the President makes a selection for the office. On average, a modern President will take 5 to 6 months to make a nomination; some positions wait for a nominee for 15 months or more. Rappaport,

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[12] See Press Release, White House, President Obama Nominates Two to Serve on the United States District Courts (Sept. 25, 2013) (*available at* http://www.whitehouse.gov/the-press-office/2013/09/25/president-obama-nominates-two-serve-united-states-district-courts).

Nonoriginalism, at 13-14. This contrasts with early Presidents working to prevent gaps—even to the point of obtaining pre-recess advice and consent for individuals uninformed of their own nomination. With advance planning, the Senate could be called upon to expedite appointments once again.[13]

Third, individuals may be appointed—with the consent of Congress—to serve temporarily in a position if the need is urgent. Federal Vacancies Reform Act, 5 U.S.C. § 3345 (2012). Someone from within the department can occupy a vacancy for a short time until an actual appointment is made. In this way, Congress allows for the government to continue operating even in emergency or unforeseeable situations—and Presidents can keep offices filled whatever the Senate's reasons are for not confirming nominees.[14]

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[13] Further evidence is the Senate's recent decision to disallow filibusters for Presidential nominations except to this Court. THE WASHINGTON POST, "Reid, Democrats trigger 'nuclear' option; eliminate most filibusters on nominees," *available at* http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html. Whatever the merits or ramifications of that decision, it shows that the political branches have room to maneuver within constitutional confines when it comes to appointments.

[14] For example, President Obama has already filled 560 vacancies using the Act. See U.S. Gov't Accountability Office, Federal Vacancies Submissions, http://www.gao.gov/legal/fedvac/searchcurr.html (search by administration to locate specific results).

That Congress did not provide for acting NLRB members, see 5 U.S.C. § 3349c(1)(a), cannot, of course, justify departing from the original meaning of the Recess Appointments Clause. If anything, it only confirms that Congress can, when it chooses, act to streamline the appointments process. After all, other multi-member bodies have received congressional approval for the appointment of acting members. Congressional inaction with respect to the NLRB, in particular, implies that Congress viewed the advice and consent requirement for that body as of higher importance than the "need" to fill spots on the Board. Given the highly political nature of the NLRB, it is unsurprising that Congress would want to ensure that its members were subject to Senate approval.

Today, it is difficult to conceive of any emergency that would necessitate an intra-session appointment. And this is true even if the Senate were prevented, for some reason, from reconvening or considering a nominee for a few days. Suppose a sudden death presented a vacancy in the armed services or in the ranks of an agency that needed to act in a time-sensitive manner. A successor from within the ranks—as a temporary or acting appointment—could be appointed to ensure the continuity of the organization. The reality, however, is that the recess-appointments power has been used (inappropriately) to by-pass the advice-and-consent requirement to fill vacancies that have been open for months or even years—belying any argument that an expansive

interpretation of the Recess Appointments Clause is necessary to prevent a breakdown in governance.

In sum, if President Madison could keep vacancies filled during the War of 1812 when a foreign power captured the capital (and burned much of it) without resort to intra-session recess appointments, today's Presidents can certainly do the same. Not only is the original meaning of the Recess Appointments Clause practicably enforceable today, but the concerns about executive irresponsibility that motivated the Framers have hardly faded into oblivion.

Consider the events now infamously known as the Saturday Night Massacre. On October 20, 1973, Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus both resigned rather than carrying out President Nixon's order to fire independent special prosecutor Archibald Cox. Richardson and Ruckelshaus had given assurances to the House Judiciary Committee that they would not interfere with Cox's work. More specifically, Richardson promised the Senate—in his confirmation hearings—that he would only fire the special prosecutor for malfeasance in office. That sort of oversight of appointments thus played a direct and substantial role in the events that unfolded—and the absence of such oversight, which always occurs with recess appointments, might have retarded the unraveling of the Watergate scandal.

Thus to whatever extent enforcing fidelity to the original meaning of the Recess Appointments Clause would require changing current practice, the Founders would likely view such changes as entirely salutary. And they would be right. The Constitution was not designed to make life as easy as possible for Presidents. The fact that Presidents in the last few decades have tried to read the Constitution to increase their own power does not make it so.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

NELSON LUND
GEORGE MASON UNIVERSITY
SCHOOL OF LAW
3301 Fairfax Drive
Arlington, Virginia 22201

AMANDA M. BRUNO
VANESSA R. BROWN
MORGAN, LEWIS &
BOCKIUS LLP
1701 Market Street
Philadelphia, Pennsylvania
19103

ALLYSON N. HO
Counsel of Record
JOHN C. SULLIVAN
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
214.466.4000
aho@morganlewis.com

W. BRAD NES
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004

AMICUS CURIAE BRIEF

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In The
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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

NOEL CANNING, A DIVISION
OF THE NOEL CORP., *ET AL.*,
Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals For
The District Of Columbia Circuit

AMICUS CURIAE BRIEF OF PROFESSOR TUAN SAMAHON IN SUPPORT OF RESPONDENT NOEL CANNING

Tuan Samahon
Counsel of Record
Faculty Office 338
Villanova University School of Law
Villanova, PA 19085
(610) 519-7088
samahon@law.villanova.edu

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INTERESTS OF *AMICUS CURIAE*

Amicus Professor Tuan Samahon, who writes about appointment and removal authority, teaches constitutional law at Villanova University School of Law.[1] His past scholarship has examined various Office of Legal Counsel (OLC) interpretations of separation-of-powers issues confronting prior administrations. *See, e.g.*, Tuan Samahon, *The Czar's Place in Presidential Administration, and What the Excepting Clause Teaches Us About Delegation*, 2011 U. CHI. LEGAL F. 169 (2011) (examining OLC subdelegation jurisprudence).

Amicus has a significant interest in this case beyond his research and teaching in these areas. Pursuant to the Freedom of Information Act (FOIA), *Amicus* requested a copy of a February 2004 OLC memorandum written by former Assistant Attorney General Jack Goldsmith on the issue of recess appointments and a January 2009 OLC memorandum written by Deputy Assistant Attorney General John Elwood on recess appointments during Senate pro-forma sessions ("Elwood Memorandum"). The Department of Justice, which released only a very heavily redacted version of the Goldsmith Memorandum and withheld entirely the Elwood Memorandum (collectively, "OLC Memoranda"),

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[1] All parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief. *Amicus*' institutional affiliation is provided only for identification purposes and does not represent any position of Villanova University.

effectively blocked research into OLC's treatment of the recess appointments issue in the prior administration. *Amicus* seeks the release the OLC Memoranda in FOIA litigation filed elsewhere. *See Samahon v. Department of Justice*, 2:13-cv-06462 (E.D. Pa. filed Nov. 6, 2013).

Relevantly, the Solicitor General relies on the same redacted and withheld advice to press factual claims and arguments about acquiescence before this Court. As *Amicus* is strongly committed to the proper interpretation of the Appointments Clause and its exceptions, he files this brief to call the Court's attention to the questionable pedigree of assertions based upon the OLC Memoranda. Before executive claims pressed before the Court may be afforded decisive weight as long pursued practice, Congress, the Court, and the public must have access to the historical records that purport to establish the asserted authority.

SUMMARY OF ARGUMENT

First, Justice Jackson's seminal *Youngstown* concurrence provides the relevant functionalist framework for resolving this congressional-executive dispute. This case falls within category three. The President labors under the heaviest of burdens articulated under this category as the President's January 4, 2012 recess appointments were incompatible with the will of Congress and any historical practice of congressional acquiescence is not pertinent. The President is left to rely solely on those powers that properly belong to his office, such as appointment under the recess exception.

The Pay Act embodies a strong congressional policy *disfavoring* presidential recess appointments; it is not properly read as congressional authorization to make the January 4 appointments.

If presidential recess appointments during pro-forma Senate sessions do not represent actions incompatible with the expressed or implied will of Congress, leaving the President in the lowest ebb, the President, at best, falls within the no man's land of Justice Jackson's "zone of twilight."

Second, if within *Youngstown* category two, Justice Frankfurter's approach to historical gloss requires the Court to *identify the specific executive practice to be addressed*. The Court should consider the four necessary elements with respect to that particular executive branch practice that is the narrowest ground for this Court's decision, i.e.,

presidential appointment when the Senate says it is in pro-forma session, or the conduct at issue in the third question presented in the certiorari grant.

To assess this historical practice, the Court must inquire whether the executive practice constitutes legitimate interpretive "gloss." It is gloss if it satisfies all four of the component elements Justice Frankfurter identified. Was the executive practice: (1) "systematic"; (2) "unbroken"; (3) "long pursued to the knowledge of the Congress and never before questioned"; and (4) "engaged in by Presidents who have also sworn to uphold the Constitution"?

The President's January 4, 2012 appointments were unprecedented and therefore not "long pursued" by the executive under the third element. Assistant Attorney General Seitz categorized the issue surrounding this practice as "novel." Novelty is not the hallmark of executive practice "long pursued" and entitled to treatment as "gloss." No prior President had attempted appointing in the manner done by President Obama on January 4, 2012.

Neither did other Presidents engage in the practice of recess appointment during a pro-forma Senate session. President Bush declined to make such appointments in January 2009 after receiving legal advice from Deputy Assistant Attorney General John Elwood. To avoid the clear implication that a past President declined to engage in this appointment conduct, the Solicitor General denies the Bush administration acknowledged the legitimacy of pro forma sessions as a means of

preventing recess appointments. Yet, the executive branch has withheld the Elwood Memorandum on FOIA Exemption 5 grounds and has repeatedly refused to release it for the Court, Congress, and the public to inspect.

The decision to withhold the Elwood Memorandum, while simultaneously relying on it as evidence of a prior administration's concurrence, casts doubt on its suitability for that purpose. There would be no reason for the administration to conceal the Elwood Memorandum if, in fact, it was in accord with the position taken by the Seitz Memorandum and asserted by the NLRB in this case. This Court should draw a negative inference from the refusal to disclose the legal advice provided in the Elwood Memorandum.

Third, this Court may take judicial notice that on November 21, 2013, the Senate abolished the filibuster for most presidential nominations. The filibuster's abolition facilitates the exercise of the advice and consent function and undermines any pragmatic argument in favor of broad appointment power under the recess exception.

ARGUMENT

I. The President Acted Incompatibly With Congress By Appointing During A Pro-Forma Session Intended To Prevent Appointment Without The Senate's Advice and Consent, Thereby Situating This Dispute Within Jackson's "Lowest Ebb" Category 3.

Justice Jackson's seminal *Youngstown* concurrence provides the relevant functionalist framework for resolving this congressional-executive dispute. Its approach groups possible disputes into three categories. "As one progresses from one category to the next, the President shoulders an increasing burden to come forward and defend his claim that Congress, acting pursuant to its enumerated powers, is treading on the President's independent, substantive powers...." Jay S. Bybee & Tuan N. Samahon, *William Rehnquist, the Separation of Powers, and the Riddle of the Sphinx*, 58 STAN. L. REV. 1735, 1739 (2006).

In the first category, the President acts "pursuant to an express or implied authorization of Congress" and enjoys all power Congress can delegate plus constitutional power the President holds "in his own right." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The second category covers those instances where the President acts with neither a congressional grant nor denial of power. If acting in this "zone of twilight," the President's claims must stand or fall on the basis of his independent

constitutional powers. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). Historical practice that evidences congressional "acquiescence is pertinent when the President's action falls within the second category, not the third." *Medellin v. Texas*, 552 U.S. 491, 495 (2008) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

In category three, the President's claims are the weakest. There, he takes "measures incompatible with the expressed or implied will of Congress." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). He is at the "lowest ebb" of his power. *Id.* at 637-38 (Jackson, J., concurring). He must rely on his own authority "minus any constitutional powers of Congress over the matter." *Id.* at 637 (Jackson, J., concurring). "In choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress" to act. *Id.* at 639 (Jackson, J., concurring). Unlike category two, claims of congressional acquiescence are not pertinent because that branch has spoken. "Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject." *Id.* at 637-38 (Jackson, J., concurring).

The President labors under the heavy burdens of category three with his January 4, 2012 recess appointments. The Senate, in concert with the House, intended to thwart presidential appointment by using pro forma Senate sessions to divide a unitary intra-session "recess" into short periods not

amenable to recess appointments. It thereby expressed its will. Nonetheless, the President acted contrary to it and recess appointed four officers. Accordingly, the President acts at the "lowest ebb" of his power and must rely uniquely on his recess appointment authority "minus any constitutional powers of Congress over the matter." *Id.* at 637-38 (Jackson, J., concurring). By making recess appointing notwithstanding the Senate's decision to remain in session, "the President cannot claim that [his action] is necessitated or invited by failure of Congress" to act. *Id.* at 639 (Jackson, J., concurring). The President enjoys only those constitutional powers that properly belong to his office, such as appointment under the recess exception, less those constitutional powers Congress properly exercises, such as its ability to frame rules for its proceedings.

Conspicuously absent from NLRB's briefing is *any* discussion of Jackson's *Youngstown* framework. NLRB is aware of *Youngstown*, yet cites only Justice Frankfurter's concurrence and how historical practice and acquiescence operate. Pet. Br. at 27-28. The Teamsters too ignore the three-category framework but likewise cite Justice Frankfurter's concurrence on historical practice. *See* Br. Resp. Int'l Brotherhood Teamsters, Local 760 at 12. The Brennan Center, in the sole merits brief that cites or discusses Justice Jackson's framework in support of Petitioner's position, does quote at length his concurrence. *See* Br. *AMICUS CURIAE* Brennan Center for Justice at 8. It relevantly observes that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with

those of Congress." *Id.* Curiously, however, it does not situate this action taken in "disjunction" with Congress within any Jackson category. Given the burden the President shoulders in category three, one is left with the abiding impression that Petitioner and its *amici* would prefer that the question of "which category?" be left unasked and unanswered. *Amicus* suggests that at oral argument the Court might inquire why this dispute does not plainly fall within category three.

Assistant Attorney General Virginia Seitz's Memorandum offers the sole analysis of Justice Jackson's *Youngstown* opinion in defense of NLRB's position. *See* Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions, 36 Op. O.L.C. __ (Jan. 6, 2012) ("Seitz Memorandum"). Tucked out of sight in footnote 27, page 21, OLC took the position that the *Youngstown* framework does not apply. It attempted to escape the "lowest ebb" implication by stating "it is unclear that Justice Jackson's framework would apply in matters involving the balance between the President's constitutional authority to make recess appointments and a single House of Congress's constitutional authority to set its internal rules." Seitz Memorandum at 21 n. 27. It is "unclear," however, why that distinction between one-chamber and two-chamber legislative action matters. *Chadha* recognized that under the Constitution "[n]ot every action taken by either House is subject to the bicameralism and presentment requirements of Article I." *INS v. Chadha*, 462 U.S. 919, 952 (1983). Indeed, "[t]he

Senate alone was given final unreviewable power to approve or to disapprove Presidential appointments," *id.* at 955, just as the Constitution gave the Senate power to "determine the Rules of its Proceedings." U.S. CONST. art. I, § 5, cl. 2. And, in any case, as the Seitz memorandum elsewhere points out, the Senate and House *did* act jointly in insisting on pro-forma sessions to block ostensible "recess" appointments. *See* Seitz Memorandum at 2-3.

If the *Youngstown* framework does control, the Seitz Memorandum claims that Congress authorized the President to recess appoint, by virtue of the Pay Act. In other words, OLC claims that the President acted within category one with explicit or implied Senate approval. It cited the executive branch's interpretation of the Pay Act, but it did not actually cite the text of the statute itself, which is hardly permissive in text or purpose.

> (a) Payment for services may *not* be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, *if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate.* This subsection does not apply—
> (1) if the vacancy arose within 30 days before the end of the session of the Senate;
> (2) if, at the end of the session, a nomination for the office, other than the

> nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent; or
> (3) if a nomination for the office was rejected by the Senate within 30 days before the end of the session and an individual other than the one whose nomination was rejected thereafter receives a recess appointment.
> (b) A nomination to fill a vacancy referred to by paragraph (1), (2), or (3) of subsection (a) of this section shall be submitted to the Senate not later than 40 days after the beginning of the next session of the Senate.

5 U.S.C. 5503 (2006) (emphasis added).

> The statute embodies a strong congressional policy disfavoring presidential recess appointments, except in limited circumstances where Congress deemed the appointment *not* to be an attempt to circumvent the ordinary advice and consent process. Nowhere does the Pay Act authorize, let alone encourage, recess appointments made in derogation of a Senate's (pro-forma) session. Finally, assuming, arguendo, that the Pay Act represents congressional authority to recess appoint during intra-session adjournments, NLRB would still need to demonstrate that the Pay Act specifically

authorized recess appointments *during Senate pro-forma sessions.*

Ironically, the Seitz Memorandum relies on the Pay Act as congressional authorization to recess appoint. First, as noted above, the statute is manifestly a restraint on the President. Second, traditionally, OLC has *doubted* the Pay Act's constitutionality. On the one hand, it characterizes the Pay Act as authorizing an allegedly broad-spanning recess power. *See* Seitz Memorandum at 7, 13, 21 n.27. On the other hand, OLC claims the Pay Act constitutes unconstitutional congressional shackles that unduly restrict presidential recess appointment authority. *See* Seitz Memorandum at 17 n.20. OLC, however, cannot have it both ways. If the Pay Act is unconstitutional, it cannot authorize recess appointments during pro-forma Senate sessions. If it is constitutional, it properly indicates Congress's desire to restrain recess appointment practice. In either case, the President cannot claim this dispute falls within category one.

II. Assuming, Arguendo, The Senate Has Been Silent And This Dispute Occurs Within *Youngstown*'s "Zone of Twilight," Undisclosed OLC's Opinions, Or Those Citing Them In Reliance, Are Undeserving of Any Judicial Deference As Interpretive Gloss.

If presidential recess appointments during pro-forma Senate sessions do not represent "measures incompatible with the expressed or implied will of Congress," the President, at best,

finds himself in the no man's land of Justice Jackson's "zone of twilight." Historical practice that amounts to "acquiescence is pertinent when the President's action falls within the second category, not the third." *Medellin*, 552 U.S. at 495.

Not all historical practice is entitled to deference. Justice Frankfurter, who was committed to judicial minimalism and facilitating workable government, nonetheless observed that some longstanding practices would not survive judicial scrutiny. "Deeply embedded traditional ways of conducting government *cannot* supplant the constitution...." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (emphasis added).[2] Neither Article V nor the judicial function permit historical practice to accumulate, like deposited sediment, to the point that it blankets and replaces a provision's bedrock principle. *Dames & Moore v. Regan*, 453 U.S. 654 (1981), adopted this approach to gloss when it observed that "past practice cannot create power," *id.* at 686, as if some sort of adverse possession over another's land. A clause's textual specificity and clear purpose resist contrary characterization by practice. Rule-oriented provisions, like the

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[2] In *Youngstown*, Justice Frankfurter interpreted the open-textured language of "the executive power." *Id.* He still concluded insufficient historical practice supported the President's challenged conduct under that clause. *Id.* In *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Court noted that "the executive power" language did not "enjoy any textual detail" and in that context deferred to the interpretive gloss placed upon it by traditional foreign affairs practice. *Id.* at 414.

Appointments Clause and its auxiliary exceptions, recall the "single, finely wrought and exhaustively considered, procedure" that governs the legislative process. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

But assuming, *arguendo*, the words of the recess exception may suffer from ambiguity, the "gloss which life has written upon" them may assist in their interpretation and is entitled to judicial deference. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring). Historical practice constitutes legitimate interpretive gloss when it satisfies all four of the component elements Justice Frankfurter identified. Was the executive practice: (1) "systematic"; (2) "unbroken"; (3) "long pursued to the knowledge of the Congress and never before questioned"; and (4) "engaged in by Presidents who have also sworn to uphold the Constitution"?[3] *Id.* at 610-11. Three elements (1, 2, and 4) focus on the President and his executive practice. Element 3 concerns Congress and the "sanction of long-continued acquiescence of Congress giving decisive weight to a construction by the Executive of its powers." *Id.* at 610 (Frankfurter, J., concurring). Historical practice short of these requirements does not merit judicial solicitude; they may represent nothing more than instances of *ultra vires* adventurism.

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[3] Justice Frankfurter offered his test in the context of a challenge to a President's executive practice. Presumably it operates symmetrically to save legislative practice that is (1) systematic; (2) unbroken; (3) long pursued to the President's knowledge and never before questioned; and (4) engaged in by prior congressional majorities whose members had also sworn to uphold the Constitution.

As a threshold matter, Justice Frankfurter's approach to historical gloss requires the Court to *identify the executive practice to be addressed.* The Court should consider the four necessary elements with respect to that particular executive branch practice that is the narrowest ground for this Court's decision: presidential appointment when the Senate says it is in pro-forma session, i.e. the third question presented in the certiorari grant. A cursory review of the elements quickly reveals the executive practice is entitled to no deference as Justice Frankfurter's interpretive "gloss."

This Court has upheld executive practice as "long pursued" when the "practice goes back over 200 years." *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003). By contrast, "unprecedented action" is by definition not long pursued and not entitled to deference. *Medellin v. Texas*, 552 U.S. 491, 532 (2008).

Such unprecedented action occurred on January 4, 2012 when President Obama took a calculated risk to become the very first president to recess appoint officers during a Senate pro-forma session.[4] OLC candidly recognized the novelty of the practice's constitutionality. Assistant Attorney General Seitz called the legality of the practice a "novel" question "with substantial arguments on each side creat[ing] some litigation risk for such appointments." Seitz Memorandum at 4 (emphasis added). Novelty is not the hallmark of executive

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[4] CFPB Director Richard Cordray's appointment is not at stake here.

practice "long pursued" and entitled to treatment as "gloss."

Neither has another President sworn to uphold the Constitution engaged in recess appointment during Senate pro-forma sessions. No prior President had attempted appointing in the manner done by President Obama on January 4, 2012. Senator Harry Reid first deployed pro-forma sessions to block Bush recess appointments in November 2007. On January 9, 2009, OLC Deputy Assistant Attorney General John Elwood considered the legality of recess appointing during a Senate's pro-forma session. Apparently, President Bush sought advice on whether he might recess appoint during the Senate's pro-forma session in his presidency's final days. The Seitz Memorandum noted his advice suggesting its reliance upon it:

> We draw on the analysis developed by this Office when it first considered the issue. *See* Memorandum to File, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Lawfulness of Making Recess Appointment During Adjournment of the Senate Notwithstanding Periodic 'Pro Forma Sessions' (Jan. 9, 2009).

Seitz Memorandum at 4. Yet, President Bush never recess appointed during the January 2009 Senate pro-forma session; presumably the Elwood Memorandum had advised he may not so appoint, or that it was highly doubtful such action would

withstand challenge. This reticence hardly constitutes a prior President's warm embrace of the practice.

To avoid the clear implication that a past President declined to engage in this appointment conduct, the Solicitor General denies the Bush administration acknowledged the legitimacy of pro forma sessions as a means of preventing recess appointments. His office claims that "there were no such acknowledgements...." Brief for the Petitioner at 10, *NLRB v. Noel Canning*, No. 12-1281 (Sep. 13, 2013). He assures that whether the President recess appointed or not during the pro-forma session "merely reflects the truism that the advice-and-consent process engages political leaders in a long course of repeated interactions, in which short-term compromises can be made despite disagreements...." Br. at 57-58. He cites a 2010 newspaper editorial, co-authored by Elwood, which implies from its title and by virtue of its authorship that the 2009 Elwood Memorandum backed presidential power to recess appoint during Senate pro-forma sessions. Br. at 57-58 n.57 (citing Steven G. Bradbury & John P. Elwood, *Recess is canceled: President Obama should call the Senate's bluff*, WASH. POST, Oct. 15, 2010, at A19).

Yet, the executive branch has withheld the Elwood Memorandum on FOIA Exemption 5 grounds and has repeatedly refused to release it for the Court, Congress, and the public to inspect. Multiple FOIA requesters, including *Amicus*, have sought it to determine whether the Seitz Memorandum is in

continuity with, or departs from, the Bush administration's reasoning. *See, e.g.*, *New York Times Co. v. U.S. Dep't of Justice*, No. 12 CIV. 3215, 2013 WL 174222 (S.D.N.Y. Jan. 7, 2013) (denying FOIA request for release of Elwood Memorandum). Disclosure would allow the public to assess whether the Bush administration believed itself free to engage in the same recess appointment conduct.

The decision to withhold the Elwood Memorandum, while simultaneously relying on it as evidence of a prior administration's concurrence, casts doubt on its suitability for that purpose. When OLC relies on prior advice as the legal basis for its reasoning, it should be disclosed to the public. When the document represents the legal opinion of an agency, "the public can only be enlightened by knowing what the [agency] believes the law to be." *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997). By basing its claim of authority on withheld advice, the government attempts to whipsaw the Court and the public. Through the Seitz Memorandum, the administration claims to draw from legal analysis expressed in the Elwood Memorandum, while shielding the analysis that ostensibly supports this position from public view. To the extent the Elwood Memorandum is relied upon not only by the Seitz Memorandum itself but by Petitioner's repeated reliance upon the Seitz Memorandum, it has been adopted as executive branch policy and should have been released.

This Court should draw a negative inference from the refusal to disclose the legal advice provided

in the Elwood Memorandum. In civil litigation, the concealment of evidence gives rise to the presumption that the evidence, if presented, would be unfavorable to the party responsible for the concealment, and all inferences may be drawn against that party.[5] There would be no reason for the administration to conceal the Elwood Memorandum if, in fact, it was in accord with the position taken by the Seitz Memorandum and asserted by the NLRB in this case.

III. Particularly Now the Senate Has Abolished the Filibuster, the Court Should Interpret the Recess Exception to Avoid Undermining the Workable Check-and-Balance of Appointment With Senate Advice and Consent.

This Court may take judicial notice that on November 21, 2013, the Senate abolished the filibuster for most presidential nominations.[6] The Senate did so by invoking the so-called "nuclear option," or as defended by some, the "constitutional option." *See* Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and*

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[5] Black's Law Dictionary defines spoliation as: "*The intentional destruction, mutilation, alteration, or concealment of evidence.*" Blacks Law Dictionary (9th ed. 2009). It goes on to state that "*If proved, spoliation may be used to establish that the evidence was unfavorable to the party responsible.*" *Id.*

[6] Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option: Eliminate Most Filibusters on Nominees*, WASH. POST, Nov. 21, 2013, *available at* http://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html.

Procedures: A Majoritarian Means to Overcome the Filibuster, 28 HARV. J.L. & PUB. POL'Y 205 (2004) (elaborating parliamentary procedure to invoke rule change by simple majority vote). Senate Rule XXII had required a three-fifths supermajority vote (i.e. 60 out of 100 votes) to invoke cloture and move to a merits vote on nominations. Now, if the President's nominee enjoys simple majority support (i.e. 51 out of 100 votes), their vote will suffice both to conclude debate and to move to a confirmation vote to approve, or disapprove, in most cases.[7]

The filibuster's abolition facilitates a President's Senate confederates in exercising the advice and consent function by simple majority. This change undermines those pragmatic arguments pressed by Petitioner's *amici* that the ordinary democratic confirmation process, because of the filibuster, had become unworkable with Senate pro-forma recess sessions. Their arguments had erroneously assumed "neither Republican nor Democratic Senators are willing to relinquish the filibuster rule." Brennan Cntr. Br. at 31-32. That factual predicate was the basis for their claims that the D.C. Circuit's interpretation of the recess power would allow a Senate minority "to hold the advice and consent process hostage to obstructionist tactics and deprive the President of any alternative means of timely filling vacancies...." *Id.* at 34-35.

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[7] The precedent established on November 21 does not apply to nominations for this Court or for action on legislation. *Id.* Should the Senate elect to revise that rule in the future, it might once more invoke the procedures of November 21 to apply majority voting rules.

"[P]ragmatic approaches to law are not naïve" and may take account of new developments in the real world, STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 83 (2011), such as the end of the filibuster.

It remains that Petitioner and its supporting *amici* might claim the Senate obstructs the President when he loses majority votes for nominees unacceptable to the fifty-first senator. That approach, however, effectively claims the confirmation process is flawed because the President dislikes the outcomes. That approach would not justify broad spanning presidential recess appointment authority when not "during the Recess of the Senate." Under category 3, "[i]n choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress" to act. *Id.* at 639 (Jackson, J., concurring). Elections have consequences and post-filibuster the country will feel them more acutely. The President's remedy for lost Senate political fights is enhanced constitutional recess appointment power. It is to win more Senate seats in the 2014 midterm elections.

CONCLUSION

The Court should affirm the judgment of the U.S. Court of Appeals.

Respectfully submitted,

TUAN SAMAHON
Amicus Curiae and *Counsel of Record*
Faculty Office 338
VILLANOVA UNIVERSITY SCHOOL OF LAW
VILLANOVA, PA 19085
(610) 519-7088
samahon@law.villanova.edu

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

NOV 2 2 2013
OFFICE OF THE CLERK

No. 12-1281

In The Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CANNING CORP., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING RESPONDENTS

GREGORY B. ROBERTSON
MICHAEL R. SHEBELSKIE
KURT G. LARKIN
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200

SHANNON LEE GOESSLING
Counsel of Record
SOUTHEASTERN
LEGAL FOUNDATION
2255 Sewell Mill Road,
Suite 320
Marietta, Georgia 30062
(770) 977-2131
shannon@
southeasternlegal.org

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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Law Library

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on important policy issues and litigates regularly before this Court.

SLF's direct interest in this case stems from its profound commitment to protecting America's legal heritage. That heritage includes the separation of powers enshrined in the Constitution, which is a vital component of the Nation's laws and a critical safeguard of political liberty. This case concerns a separation-of-powers violation by the President and thus implicates one of SLF's core concerns.

The *amicus* brief of Professor Williams – which argues that the Court should abstain based on the political question doctrine – is of particular concern. His brief promotes the expansion of that doctrine to an extent that would impede the Court's enforcement of the separation of powers and undermine the benefits of that political safeguard. SLF files this *amicus*

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[1] Pursuant to Sup. Ct. R. 37.6, SLF hereby represents that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of *amicus curiae* briefs by filing letters evidencing their consent with the Clerk of Court.

brief to explain why the political question doctrine does not apply here.

SUMMARY OF THE ARGUMENT

Professor Williams' acknowledgement that his political question arguments "did not fair [sic] well in courts below" is an understatement. (*Amicus Curiae* Br. Of Professor Victor Williams In Supp. Of Pet'r And Urging Reversal at 28 [hereafter Williams Br.].) Six courts of appeals have heard challenges to recess appointments on the grounds raised in this appeal. Each of them decided those challenges on the merits. None held that the challenges were nonjusticiable. And not even the National Labor Relations Board (Board) advocates that the questions presented in this appeal are nonjusticiable political questions, though the Board would have every incentive to advance that argument if it was plausible.

The uniform rejection of Professor Williams' position comports with this Court's settled precedent. The political question doctrine is narrow. It does not bar judicial review because the actions of a coordinate Branch are at issue. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Nor does it bar review because a case may have "significant political overtones." *INS v. Chadha*, 462 U.S. 919, 942 (1983). Rather, the doctrine is confined to six limited circumstances, and throughout history, the Court has been reluctant to find those circumstances present. The Judiciary has the responsibility to decide cases, "even those it 'would gladly

avoid,'" and that responsibility cannot be evaded through the political question doctrine. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

Professor Williams emphasizes two factors. First, he contends that the Constitution reflects a "textual commitment" of the questions presented to the President's discretion. (Williams Br. at 10.) Second, he contends that there is a "lack of judicially discoverable and manageable standards" to resolve those questions. (*Id.* at 24.) He is incorrect on both scores. Nothing in the Constitution vests the President with sole authority to decide what is meant by the phrase "all Vacancies that may happen during the Recess of the Senate." That phrase is an express textual limitation on the President's appointment power, and it is the province of the Judiciary to enforce such limitations that the Constitution imposes on the other Branches when there is a dispute over their meaning. *Powell v. McCormack*, 395 U.S. 486, 519-20 (1969). Moreover, the Court need look no further than the decision below for a judicially discoverable and manageable standard. That decision bases its ruling on the text, structure and history of the Recess Appointments Clause – time-honored sources for judicial interpretation of the Constitution – and discerns bright-line rules that are easy to apply. It is a standard example of "what courts do." *Zivotofsky*, 132 S. Ct. at 1430.

Professor Williams' contrary arguments are unavailing. Most fundamentally, he misperceives the

questions presented. He argues that the President has broad discretion in how he exercises the recess appointment power, but that is not the issue. The issue is a narrower one. It is whether the preconditions exist for the President to exercise his recess appointment power at all – namely, is the Senate in the Recess and does a qualifying Vacancy exist. The President's discretion whether to fill a qualifying Vacancy while the Senate is in the Recess – and his discretion over the choice of any appointee – have no bearing on those antecedent questions.

Professor Williams' other arguments fare no better. Infected by his misapprehension of the questions presented, his arguments do not present valid grounds for the Court to abdicate its responsibility to decide this case:

- Professor Williams erroneously construes the absence of any advice-and-consent-role by the Senate over the President's choice of a recess appointee as a textual commitment to the President of unbridled discretion to decide whether the Senate is in the Recess and when a Vacancy happened. But the choice of a recess appointee is manifestly distinct from whether the Senate is in the Recess and when a Vacancy happened. Neither political Branch is committed with the sole discretion to decide those issues. It is a matter for the Judiciary when the Branches' views are in conflict.

- Professor Williams erroneously recounts the history of the Constitutional Convention. Contrary to his assertion, that body did not favor giving the President predominate authority over federal appointments. The Delegates at the Convention were deeply divided over the issue and resolved the controversy by giving the President and the Senate joint responsibility over federal appointments.

- Professor Williams is incorrect that the case will ensnare the Court in a "political thicket" that lacks manageable standards. That argument again reflects his misunderstanding of the questions presented, as well as his misplaced effort to expand this appeal to address the filibuster rule and the politics of the Senate's advice and consent role.

- Precedent squarely rejects Professor Williams' contention that the Court ought to abstain because the appointment power allegedly poses a "conflict" for the Judiciary. This Court regularly decides challenges to the appointment of federal officers and indeed has declared that courts should decide such challenges "on the merits." *Ryder v. United States*, 515 U.S. 177, 182-83 (1995).

- The *de facto* officer doctrine defeats Professor Williams' alarmist proposition that affirmation of the decision below

will retroactively invalidate every intra-session appointment ever made. That doctrine confers validity upon acts performed by a person acting under color of official title against belated challenges, even if it is later discovered that the legality of the person's appointment to office was deficient. *Ryder*, 515 U.S. at 180; *Norton v. Shelby County*, 118 U.S. 425, 440 (1886).

- In *United States v. Munoz-Flores*, 495 U.S. 385, 393 (1990), the Court rejected Professor Williams' suggestion that a separation-of-powers challenge is non-justiciable because it does not involve individual rights. The Court held that the alleged absence of an individual right is not among the factors that determine whether a claim is political and that the separation of powers is vital "to secure liberty" in any event.

ARGUMENT

I. Precedent overwhelmingly demonstrates that the narrow questions presented in this appeal are justiciable.

Six courts of appeals have considered whether the President's recess appointment power applies to intra-session adjournments of the Senate and whether that power is additionally limited to Vacancies that arise during the Recess in which the President seeks

to make the appointment. Three of those courts considered those issues in connection with the same appointments that are at issue here. *NLRB v. Enter. Leasing Co. Se., LLC*, 722 F.3d 609 (4th Cir. 2013); *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013); *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted sub nom. NLRB v. Noel Canning*, 133 S. Ct. 2861 (U.S. June 24, 2013) (No. 12-1281). The other three considered them in connection with other appointments. *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962).

Each of those courts decided the issues on the merits. Not one held that the issues were non-justiciable political questions. One of those courts in particular, the Third Circuit in *New Vista*, considered Professor Williams' arguments in detail and rejected them all, describing them as "unfounded" and not "persuasive." *New Vista*, 719 F.3d at 215, 217. The Third Circuit's analysis of Professor Williams' arguments is well reasoned. Settled precedent squarely establishes that the narrow questions presented in this case are justiciable.

A. The political question doctrine does not allow courts to abstain except in very limited circumstances that are rarely present.

The political question doctrine is "narrow." *Zivotofsky v. Clinton*, 132 S. Ct. at 1427. A nonjusticiable

political question does not exist unless at least one of the following is an "inextricable" aspect of the issue: (i) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (ii) a lack of judicially discoverable and manageable standards for resolving the issue; (iii) the impossibility of deciding the issue without an initial policy determination of a kind clearly for nonjudicial discretion; (iv) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate Branches of government; (v) an unusual need for unquestioning adherence to a political decision already made; and (vi) the potential for embarrassment from multifarious pronouncements by various departments on one question. *Id.* at 1431 (Sotomayor, J., concurring); *Chadha*, 462 U.S. at 941; *Powell*, 395 U.S. at 518-19; *Baker*, 369 U.S. at 217.

The Court has boxed the political question doctrine within those six parameters, to ensure the Judiciary fulfills its duty "to say what the law is." *Zivotofsky*, 132 S. Ct. at 1427-28 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). As the Court has explained, "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 132 S. Ct. at 1427-28 (quoting *Cohens*, 19 U.S. at 404). "That duty will sometimes involve the '[r]esolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility merely 'because the issues have political

implications.'" *Zivotofsky*, 132 S. Ct. at 1427-28 (quoting *Chadha*, 462 U.S. at 943) (alteration in original).

Accordingly, the political question doctrine does not bar judicial review because the actions of a coordinate Branch are at issue. *Baker*, 369 U.S. at 211-12. Nor does it bar review because the case touches on political events of the day and may have "significant political overtones," *Chadha*, 462 U.S. at 942; *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (*accord*), or because "the question is difficult, the consequences weighty, or the potential for real conflict with the policy preferences of the political branches." *Zivotofsky*, 132 S. Ct. at 1432 (Sotomayor, J., concurring). The doctrine is one of "political questions," not one of "political cases." *Baker*, 369 U.S. at 217.

That this appeal concerns the separation of powers between the Executive and Legislative Branches does not counsel a different result. As the Court recently acknowledged in rejecting the contention that a separation-of-powers issue poses a nonjusticiable political question, the Judicial Branch "appropriately exercises" its authority to decide cases "where the question is whether Congress or the Executive is 'aggrandizing its power at the expense of another branch.'" *Zivotofsky*, 132 S. Ct. at 1428 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991)).

That holding rests on a long line of decisions adjudicating the merits of separation-of-power claims

over the contention that they are nonjusticiable political questions. *See, e.g., United States v. Munoz-Flores*, 495 U.S. 385, 390-91 (1990) (deciding the merits of an Origination Clause dispute over contention that it raised a nonjusticiable separation-of-powers issue); *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 487 (1989) ("[A]s to the particular divisions of power that the Constitution does in fact draw, we are without authority to alter them, and indeed we are empowered to act in particular cases to prevent any other Branch from undertaking to alter them"); *Chadha*, 462 U.S. at 941 (holding that separation-of-powers challenge to legislative veto presented no political question); *Buckley v. Valeo*, 424 U.S. 1, 123 (1976) ("This Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it.").

Indeed, the Judiciary ought to be especially diligent to decide separation-of-powers cases in light of their importance to our constitutional structure and its preservation of liberty. As the Court has explained: "[T]he greatest security against tyranny – the accumulation of excessive authority in a single Branch – lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch." *Mistretta v. United States*, 488 U.S. 361, 381 (1989). Or as the Court has more succinctly put it: "'[T]he Constitution diffuses power the better to secure liberty.'" *Morrison*

v. Olsen, 487 U.S. 654, 694 (1988) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

The separation of powers enshrined in the Constitution's treatment of federal appointments – through the check and balance provided by the Senate's advice and consent power – is an integral part of that safeguard. That check and balance, the Court has explained, "is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (quoting *Buckley*, 424 U.S. at 125) (italics in original).

The Court would erode that safeguard if it abstained from cases challenging the constitutional propriety of federal appointments, and so the Court has declared that such challenges ought to be decided on their merits:

> We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred. Any other rule would create a disincentive to raise *Appointments Clause* challenges with respect to questionable judicial appointments.

Ryder, 515 U.S. at 182-83. In fact, constitutional challenges to appointments are so important that the Court has considered their merits even when they

were not preserved below. *Freytag*, 501 U.S. at 878-89.

Consistent with that directive, the cases are legion in which the Court decided the merits of Appointments Clause challenges. The political question doctrine did not bar resolution of those challenges even though they entailed separation-of-powers violations. *See, e.g., Morrison*, 487 U.S. at 693 (upholding a statute that allowed appointment of independent counsel by Judiciary against claim that it violated separation of powers "by unduly interfering with the role of the Executive Branch."); *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (holding unconstitutional a statute that permitted Congress to remove official who participated in executive powers, because it violated separation of powers); *Buckley*, 424 U.S. at 120-43 (holding unconstitutional a statute that prescribed the manner for appointing members of Federal Election Commission as violation of separation of powers).

B. None of the circumstances necessary to make an issue a nonjusticiable political question are present here.

This case no more presents a nonjusticiable political question than the myriad of cases in which the Court previously adjudicated the merits of appointment challenges that implicated the separation of powers. None of the factors necessary for a political question are present.

1. The Constitution does not commit resolution of the questions presented to the President.

The Third Circuit succinctly explained in *New Vista* why the first factor – a textually demonstrable constitutional commitment of the issue to the President – is absent. It wrote:

> Nothing in the language of the Recess Appointments Clause textually commits to the president the task of defining "recess." The Clause states that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II § 2, cl. 3. This language lacks the explicit assignment of power to any one branch, such as the assignment found in the Constitution's Impeachment Trial Clause which states that "[t]he Senate shall have the sole Power to try all Impeachments."

New Vista, 719 F.3d at 216. In so holding, the Third Circuit contrasted the present situation with the impeachment challenge that the Court confronted in *Nixon v. United States*, 506 U.S. 224 (1993). There, an impeached judge challenged the Senate's procedures for impeachment trials. The Court held that challenge raised a nonreviewable political question because the Constitution expressly states that the Senate has the "sole Power to try all Impeachments." U.S. Const. art. I, § 3, cl. 6. The Court viewed that proviso as an exclusive grant that made the Senate's

choice of procedures for an impeachment trial unreviewable. *Nixon*, 506 U.S. at 228-37. But unlike that case, the Recess Appointments Clause has no comparable language giving the President "sole" authority to decide when the Senate is in the Recess and when a Vacancy happened.

Properly read, the phrase "all Vacancies that may happen during the Recess of the Senate" is a limiting condition on the exercise of the President's appointment power. It defines, and thereby limits, the circumstances in which the President is empowered to appoint federal officers without the Senate's advice and consent. As such, the Judiciary is empowered to interpret that limitation and enforce it, to ensure that the Executive Branch exercises the power only when the specified conditions are present and does not "aggrandiz[e] its power at the expense of" the Senate. *Zivotofsky*, 132 S. Ct. at 1428.

The Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969), illustrates this point. In *Powell*, the Court considered whether it could review the House of Representatives' conclusion that Clayton Powell was "unqualified" to sit as a Member because he had been accused of misappropriating public funds and abusing the judicial process of the State of New York. *Id.* at 492-93. The House contended that its decision was a nonjusticiable political question because Article I, § 5 of the Constitution directs that the House shall "be the Judge of the Elections, Returns and Qualifications of its own Members." The House argued that this was a textual commitment of unreviewable authority

to it. *Id.* at 519. However, Article I, § 2 of the Constitution specifies only three qualifications for membership in the House: age, citizenship, and state residency. Powell argued that these constrained the grounds on which the House could declare a member unqualified and that the Court could declare whether the grounds for his expulsion satisfied those criteria. *Id.*

The Court agreed with Powell. The Court held that the qualifications stated in Article I, § 2 constrain the House's exercise of power under Article I, § 5 because they prescribe the only grounds on which the House can declare a Member unqualified. *Id.* at 548. So even though a court cannot second-guess the House's determination that a Member does not meet one of the three qualifications, a court can review that determination to assess whether the House improperly relied on some other ground. The enforcement of that limitation was not a nonjusticiable political question. *Id.* As the Court later described its holding: "The decision as to whether a Member satisfied these qualifications *was* placed with the House, but the decision as to *what* these qualifications consisted of was not." *Nixon*, 506 U.S. at 237.

The Constitution contains many other instances where a discretionary power of a political Branch is subject to a judicially enforceable condition, such as the 10-day period allowed the President to decide whether to veto a bill submitted by Congress, U.S. Const. art. I, § 7, cl. 2, and the requirement for a two-thirds vote for the Senate to approve a constitutional amendment. U.S. Const. art. V. The Court has

routinely adjudicated the meaning of those types of conditions and enforced them even though it cannot review the substantive merits of the political Branches' decisions in those instances. *See, e.g.*, *Chadha*, 462 U.S. at 940-41 (holding that Congress' plenary authority over immigration and naturalization does not render its actions in that area immune from judicial review under the political question doctrine); *Buckley*, 424 U.S. at 132 (holding that Congress is not allowed to exercise its plenary authority in a manner that "offend[s] some other constitutional restriction").

The same is true here. The President may have unreviewable discretion whether to fill a qualifying Vacancy during the Recess of the Senate. The President does not, however, have unreviewable discretion to decide when the Senate is in the Recess or when a Vacancy happens. Nothing in the Constitution commits to the President the sole authority to decide whether those prerequisites to the exercise of the appointment power exist. Those are matters that the courts are empowered to adjudicate and are grounds upon which the courts can declare a recess appointment invalid.

2. Traditional sources of Constitutional interpretation readily provide judicially discoverable and manageable standards to resolve this appeal.

The parties' briefs dispel any suggestion that there are no "judicially discoverable and manageable standards" to decide this appeal and that the Court must resort instead to "policy determinations." The Board and Noel Canning advocate interpretations of the Recess Appointments Clause grounded in the text, structure and history of the Clause. Though they reach conflicting conclusions, their arguments "sound in familiar principles of constitutional interpretation." *Zivotofsky*, 132 S. Ct. at 1430. They require the Court to undertake a "careful examination of the textual, structural and historical evidence put forward by the parties." *Id.* That is a standard method for judicial interpretation of the Constitution and demonstrates that the case does not "turn on standards that defy judicial application." *Baker*, 369 U.S. at 211. As the Court stated in *Zivotofsky*: "This is what courts do. The political question doctrine poses no bar to judicial review of this case." 132 S. Ct. at 1430; *see also Munoz-Flores*, 495 U.S. at 395 (noting the Government's concession that "the analysis of statutes and legislative materials, is one that is familiar to the courts and often central to the judicial function").

What the Court is called upon to do in this case is thus no different than what the Court did in *The*

Pocket Veto Case, 279 U.S. 655 (1929). There, the Court interpreted the word "Adjournment" in the Presentment Clause. U.S. Const. art. I, § 7, cl. 2. To do so, the Court examined the text, structure and purpose of the clause. *Pocket Veto*, 279 U.S. at 673-74. It considered the proceedings and debates of the Constitutional Convention. *Id.* at 675-76. It considered historical practices. *Id.* at 682-88. The Court held that in light of those considerations that, "Adjournment" in the Presentment Clause is not limited to a final adjournment that terminates the legislative existence of a Congress, but includes the end of an interim congressional session. *Id.* at 680, 691-92. The Court is called upon to undertake the same type of analysis in this case with respect to the terms "the Recess" and "happen." And just as the meaning of "Adjournment" was not a nonjusticiable political question that defied judicial explication, the meaning of "the Recess" and "happen" can be ascertained from the same sources that typically guide the Court's interpretation of the Constitution.

The Court also need look no further than the decision below for manageable standards to be used as the meaning of those terms. The D.C. Circuit held that the Senate is in "the Recess" when the Senate ends a session by adjourning *sine die*. *Noel Canning*, 705 F.3d at 512-13. It further held that the only Vacancies the President can fill during a particular Recess are those that arose during that Recess. *Id.* at 513.

Those are bright-line rules that are easy to apply, in keeping with this Court's direction for "high walls and clear distinctions" to preserve the separation of powers. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). An adjournment *sine die* has a well established meaning. Indeed, the U.S. Code is replete with statutes that use the term. *E.g.*, 2 U.S.C. §§ 29(a), 36, 43b-2, 198, 288i(c)(2), 641; 5 U.S.C. §§ 906(b)(1), 3131, 3345, 3346; 7 U.S.C. § 1343; 10 U.S.C. §§ 652, 671b, 2401, 2464, 2484, 6035, 7306, 7307; 12 U.S.C. §§ 635, 2252; 15 U.S.C. §§ 719f, 1204, 1276, 2083; 16 U.S.C. §§ 470w-6, 1434, 1606, 1823, 3166, 3232; 20 U.S.C. § 4502; 22 U.S.C. § 2799aa-1; 28 U.S.C. §§ 153, 992; 33 U.S.C. § 1414; 38 U.S.C. § 510; 42 U.S.C. §§ 2000e-4, 2000ee, 2159(g)(1)(A), 2210, 6272, 6421, 6422, 9655, 10135; 44 U.S.C. § 2203; 45 U.S.C. § 718.

It is also easy to know when the Senate has adjourned *sine die*. The Senate says so in its orders. As the Board concedes, the Senate adjourns *sine die* when it adjourns "without specifying a day for its return." (Br. For The Pet'r at 12.) That makes the determination of whether the Senate has adjourned *sine die* a straightforward matter. In the words of the Third Circuit, the standards adopted by the D.C. Circuit are judicially manageable because "they rely on regular procedures employed in the Senate and found in the Senate's record." *New Vista*, 719 F.3d at 217. And, of course, not even Professor Williams questions that it is a straightforward matter to determine when a Vacancy happens.

It is true that the Board's more open-ended definition of the Recess, as Professor Williams notes, might be unmanageable because it does not rely on any particular Senate procedure and would require judicial review of communications between the Executive and Legislative Branches in addition to review of congressional scheduling schemes. (Williams Br. at 22-25.) But this only cautions against selecting the Board's standard rather than showing that there are no judicially manageable standards available.

3. The remaining factors do not apply to this case.

There is no need to dwell on the remaining factors that could cast an issue as a political question because they are not applicable here. The Court has stated that the kind of cases that might pose those circumstances are "rare" and "exceptional," *Zivotofsky*, 132 S. Ct. at 1434 (Sotomayor, J., concurring), and this case does not rise to that level. Indeed, Professor Williams does not suggest any potential for "embarrassment from multifarious pronouncements" by the various Branches, and the Third Circuit in *New Vista* explained why the other two remaining factors are inapposite as well.

As the Third Circuit explained, defining the term the Recess "does not express a lack of respect for coordinate branches of government because defining the word is merely an exercise of [the courts'] judicial

authority 'to say what the law is.'" 719 F.3d at 215 n.5. That is true even though the Court is asked to declare unconstitutional the actions of another Branch. As the Court's decisions make clear, courts have the "duty" to review the constitutionality of the actions of the political Branches, and it is no disrespect for the courts to perform that duty. Otherwise, "*every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible." *Munoz-Flores*, 495 U.S. at 390; *accord Powell*, 395 U.S. at 549 ("Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.").

Nor are the President's recess appointments freighted with "an extreme need for finality" in contrast to, for example, the situation posed by the President's decision to end a military conflict. *Baker*, 369 U.S. at 213 (discussing the need for finality in the context of the President's war power to end a conflict). Indeed, the President is "pledge[d] to uphold the entire Constitution, not just those provisions that protect its institutional prerogatives." *Munoz-Flores*, 495 U.S. at 392-93 (emphasis in original). It certainly cannot be the case that the President's decisions that impinge on another Branch's prerogatives demand finality beyond the ken of judicial review in light of the President's duty to uphold all of the Constitution.

II. Professor Williams' arguments lack merit.

Professor Williams' arguments flow from a fundamental misapprehension of the narrow questions presented on appeal. Those questions are: (1) is the term "the Recess" limited to breaks between Senate sessions; (2) are the only Vacancies that the President may fill during a particular Recess those that arise during that Recess; and (3) do *pro forma* sessions of the Senate count as part of a Senate session. Those questions do not seek review of how the President exercises his appointment power. That is, they do not seek review of the President's decision to fill a qualifying Vacancy through a recess appointment or his choice of appointee. Rather, they concern whether there is a qualifying Vacancy that the President may fill. Professor Williams overlooks that distinction and argues as if the former is the object of this appeal. As the Third Circuit described Professor Williams' error, he improperly "merges the issue present in this case (when the President can use his recess-appointments power) with an issue not in this case (how the President can use that power)." *New Vista*, 719 F.3d at 217. That error permeates and invalidates his arguments for nonjusticiability.

A. Professor Williams' efforts to find a textual commitment to the President are flawed.

Professor Williams advances three reasons why he contends the Constitution endows the President with unreviewable discretion to make the recess

appointments in this case. None of those propositions is correct.

First, Professor Williams points to the lack of any advice-and-consent role for the Senate over the President's choice of a recess appointee. That argument is a non-sequitur. It does not follow that the Constitution gives the President discretion over the meaning of the terms "the Recess" and "Vacancies that may happen" because it gives him discretion over the separate matter of the choice of a recess appointee. By way of comparison, the Constitution gives the Congress unreviewable discretion to decide when to end an annual session. U.S. Const. art. I, § 4, cl. 2; amend. XX, § 2. But no one suggests that because the Senate determines when an intersession recess starts, the Senate also gets to determine whether the President's appointment power is limited to such breaks. The short answer is that the Constitution does not give either political Branch discretion over that issue. That is what the Third Circuit held in *New Vista*, stating that the Recess Appointment Clause "does not contain an imperative to either branch to craft a rule regarding the meaning of recess – or, more broadly, when the president may use his recess appointments power." 719 F.3d at 216.

Likewise flawed is Professor Williams' second contention that no provision of the Constitution would be impaired if the President were held to have exclusive authority to decide when recess appointments can be made. (Williams Br. at 18.) That argument overlooks the Appointments Clause. Any

expansion in the scope of the Recess Appointments Clause necessarily would come at the expense of the Senate's advice-and-consent power under the Appointments Clause. This competing tension, which Professor Williams ignores, provides further weight to the conclusion that the Constitution did not commit to either political Branch the authority to decide the questions presented in this appeal and left it to the Judiciary to arbitrate. *See Freytag*, 501 U.S. at 879-80 (rejecting the argument that the Court should defer to the Executive's view that there has been no encroachment of the separation of powers in an Appointments Clause challenge).

Finally, Professor Williams places great stock in the debates at the Constitutional Convention. (Williams Br. at 11-14.) Professor Williams depicts those debates as embodying a universal sentiment among the Framers that the President was to have primacy in filling federal offices and that Congress was viewed as too political to play a role in that process. His recitation of history is incorrect.

"The manipulation of official appointments had long been one of the American revolutionary generation's greatest grievances against executive power, because the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag*, 501 U.S. at 883 (citation omitted). The question of where to repose the appointment power thus was of vital concern to the Delegates to the Constitutional Convention, and it proved especially difficult to resolve.

Some Delegates favored vesting the power in the President; others favored Congress. The intensity of opposing views prevented resolution of the matter for months. Professor Williams notes that during those debates the Convention rejected proposals to give Congress sole power to fill federal offices. (Williams Br. at 11.) But the Convention likewise rejected all proposals to give the President that sole power. *See* Joseph Harris, *The Advice and Consent of the Senate* 20-22 (University of Calif. Press 1953); Charles Warren, *The Making of the Constitution* 642 (rev. ed. 1937).

The controversy was not resolved until the Convention's end when, after much debate, the Framers devised a compromise: they vested the appointment power for principal federal officers in the President and Senate jointly, and they allowed Congress alone the power to decide how inferior officers are appointed. The Federalist Papers relate the importance the Framers attached to the Senate's role in the appointment process:

> It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connections, from personal attachment, or from a view to popularity.

The Federalist No. 76 (Alexander Hamilton) (C. Rossiter ed. 2003).

History shows, contrary to Professor Williams' depiction that "[t]he President's power to select principal officers of the United States was not left unguarded." *Edmond*, 520 U.S. at 659. The requirement for the Senate's advice and consent was included precisely "to curb executive abuses of the appointment power" and "to promote a judicious choice of [persons] for filling the offices of the union." *Id.* (quoting The Federalist No. 76). In sum, Professor Williams is just plain wrong that the Delegates at the Constitutional Convention favored giving the President predominant authority over appointments. *See Freytag*, 501 U.S. at 879-80 (holding that the structural prerogatives of the Appointments Clause do not speak exclusively, or even primarily, to the Executive's interest); *Buckley*, 424 U.S. at 121 ("The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President.").

Furthermore, it is significant that the Recess Appointments Clause was agreed to only after the last minute compromise on the Appointments Clause, and was added without objection or recorded debate. *See* 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 292 (Jonathan Elliot ed., 2d ed. 1836-1845) [hereafter, J. Elliot]; 2 *The Records of the Federal Convention of 1787*, at 46 (Max Farrand ed., Yale University Press 2d ed. 1937); James Madison, *Notes of Debates in the Federal Convention of 1787*, at 599 (Ohio Press 1966). The Recess Appointments Clause would not have been

uncontroversial if the Framers viewed it as undoing the compromise that they had so painstakingly worked out in the Appointments Clause after months of debate. There would have been rancor and heated debate if the Recess Appointments Clause was a back-end way to give the President predominant authority over federal appointments, rather than a limited exception applicable only to breaks between Senate sessions.

B. The case will not embroil the Court in a political thicket.

Professor Williams' warning that there are no manageable judicial standards "to resolve the escalating campaign of appointment obstruction" (Williams Br. at 6) is yet another manifestation of his misunderstanding of this appeal's limited focus. The question he frames is not what the Court is called upon to answer, which is the meaning of "the Recess" and "happen" as used in the Recess Appointments Clause. Professor Williams offers no commentary on those issues, and certainly does not explain why those limited issues defy judicial interpretation.

Related to this point, Professor Williams states that the Eleventh Circuit in *Evans* agreed with his view and held that a challenge to a recess appointment was a nonjusticiable political question. (Williams Br. 25-26.) He misreads that opinion. The court in that case addressed head-on whether the President may make a recess appointment during an intra-session Senate adjournment, whether the President

may do so to fill a vacancy that arose while the Senate was in session, and whether an intra-session adjournment of eleven days is of sufficient length to constitute a "recess" – all issues implicated by the instant appointments. This is exactly what the D.C. Circuit did in this case and the Third and Fourth Circuits did in *New Vista* and *Enterprise*, respectively.

The issue the *Evans* court declined to address was one *not* presented in this appeal: whether the President should have selected as a recess appointee an individual whose prior nomination "had been especially controversial and [whose] confirmation had been blocked in the Senate." *Evans*, 387 F.3d at 1227. The court recognized this last argument "presents a political question that moves beyond interpretation of the text of the Constitution and on to matters of discretionary power, comity and good policy." *Id.* That issue is very different than the questions presented in this appeal.

As this shows, Professor Williams misconstrues the nature of the challenges – and the circuit court's ruling – in *Evans*. The only claim that was rejected on nonjusticiability grounds in *Evans* focused on the fitness of the individual chosen for a recess appointment. The court decided the merits of the appellant's challenges to the President's authority to make the appointment at all. The *Evans* court ruled the appellant's narrow challenge to the choice of nominee was the only one that strayed into purely political matters beyond the court's jurisdiction to decide. *Id.* The Eleventh Circuit's approach to the nonjusticiability

question is entirely consistent with the approach taken by the *New Vista* and *Enterprise* courts and the lower court in this case.

Here, like in *New Vista* and *Enterprise*, the respondent is not asking this Court to opine on the fitness for duty of the Board members whose appointments are challenged. Nor is it asking this Court to pass judgment on what Professor Williams calls the "House majority and Senate minority scheduling collusion." (Williams Br. at 5.) It asks that the Court do only what every other federal appellate court to have addressed these issues has done, and what *Zivotofsky* demands – to interpret the text of the Constitution, define "the Recess of the Senate," and address the merits of the Respondent's challenges to the appointments.

C. The Judiciary does not have a conflict of interest.

There is no merit to Professor Williams' contention that the Court should abstain because this appeal "presents a significant conflict-of-interest for the judiciary." (Williams Br. at 19.) The Court has regularly and consistently decided challenges to the appointment of federal officers. The Court has never intimated that it is disabled from deciding them because of a conflict of interest, even when the officer has judicial functions. *E.g., Edmond v. United States*, 520 U.S. 651 (1997) (challenge to appointment of civilian judges to Coast Guard Court of Criminal

Appeals); *Weiss v. United States*, 510 U.S. 163 (1994) (challenge to appointment of military judges); *Morrison v. Olson*, 487 U.S. 654 (1988) (challenge to appointment of independent prosecutor by Article III court); *Buckley v. Valeo*, 424 U.S. 1 (1976) (challenge to appointment of Federal Election Commissioners).

Professor Williams' contention reflects a misconstruction of *Nixon v. United States*, 506 U.S. 224 (1993). The Court noted in that opinion that the Framers viewed impeachment as a check that Congress has on the Judiciary. *Id.* at 234-35. That fact bolstered the Court's conclusion that the Judiciary should not override the Constitution's express conferral to the Senate of "sole Power" to try impeachments, because otherwise the Judiciary could sit in judgment of the Senate's decision to convict an impeached judge. *Id.* at 234-36. A grant of "sole Power" to the Senate in one clause of the Constitution in no way supports the very different notion that an utterly distinct and wholly unrelated clause containing no such grant is likewise a check on the Judiciary. There is no historical support for this novel proposition, and Professor Williams cites nothing to show that the Framers viewed the Recess Appointments Clause as a check on the Judiciary by the Executive.

D. Affirmation will not retroactively invalidate all prior intra-session appointments.

Professor Williams' alarmist contention that affirmation of the decision below will invalidate all prior intra-session appointments overlooks the *de facto* officer doctrine. That doctrine confers validity upon acts performed by a person acting under the color of official title against belated challenges, even if it is later determined that the person's appointment was legally deficient. *Ryder*, 515 U.S. at 180; *Norton*, 118 U.S. at 440. The Court has relied on that doctrine to uphold actions of otherwise improperly appointed federal officials against belated challenges to their appointments. *E.g., McDowell v. United States*, 159 U.S. 596 (1895); *Ball v. United States*, 140 U.S. 118 (1891). One of those instances even involved a recess appointee. *Ex parte Ward*, 173 U.S. 452 (1899) (applying *de facto* officer doctrine to district court judge who was recess appointee). The chaos that Professor Williams fears has not occurred during the century (and more) that the Court has applied the *de facto* officer doctrine, so there is no reason to cry wolf now.

E. The asserted lack of individual rights is not germane.

Finally, Professor Williams adds that it "is important to underline that no individual rights claim" is involved in this case. (Williams Br. at 18-19.) He does not explain why he thinks that is important, but this Court's decision in *United States v. Munoz-Flores*,

495 U.S. 393 (1990), forecloses any contention that it is germane to the political question doctrine. The claim in that case concerned the constitutionality of a statute that had been passed in violation of the Origination Clause. In arguing – unsuccessfully – that the claim was a nonjusticiable political question, the Government argued that the Origination Clause "does not significantly affect individual rights." *Id.* at 392. The Court rejected that contention on two grounds. The Court observed first that "the asserted lack of a connection between the constitutional claim and individual rights" is not a factor that its decisions identify "as a characteristic of cases raising political questions." *Id.* at 392. The asserted lack of an individual right, the Court expanded, "is simply irrelevant to the political question doctrine." *Id.* at 393-94. Second, the Court explained that any suggestion that compliance with the Origination Clause "is irrelevant to ensuring rights is in error." *Id.* at 394. That clause is part of the Constitution's separation of powers, with its checks and balances, which the Court has repeatedly emphasized, is vital "to secure liberty." *Id.* at 394. Professor Williams repeats the Government's unsuccessful argument from *Munoz-Flores*, and it deserves the same fate here.

CONCLUSION

The Court should reject any contention that the questions presented in this appeal are nonjusticiable political questions. Those questions concern express

constitutional limitations on the President's recess appointment power. The Court is empowered, and obligated, to adjudicate what those restrictions mean and to invalidate the appointments at issue since they were made in contravention of those restrictions.

For the foregoing reasons, *Amicus Curiae* respectfully requests that this Court affirm the decision below.

Respectfully submitted,

GREGORY B. ROBERTSON
MICHAEL R. SHEBELSKIE
KURT G. LARKIN
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200

SHANNON LEE GOESSLING
Counsel of Record
SOUTHEASTERN
LEGAL FOUNDATION
2255 Sewell Mill Road,
Suite 320
Marietta, Georgia 30062
(770) 977-2131
shannon@
southeasternlegal.org

Counsel for Amicus Curiae

November 22, 2013

AMICUS CURIAE BRIEF

No. 12-1281

In the
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP.,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF THE STATE NATIONAL BANK OF BIG SPRING, THE COMPETITIVE ENTERPRISE INSTITUTE, AND THE 60 PLUS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

GREGORY JACOB
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 I St. NW
Washington, DC 20006
(202) 383-5300

C. BOYDEN GRAY
ADAM J. WHITE
Counsel of Record
BOYDEN GRAY & ASSOCIATES
1627 I Street NW, Suite 950
Washington, DC 20006
(202) 955-0620
adam@boydengrayassociates.com

Counsel for Amici Curiae
[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

ADDITIONAL COUNSEL

SAM KAZMAN
HANS BADER
COMPETITIVE ENTERPRISE INSTITUTE
1899 L St. NW, Floor 12
Washington, DC 20036
(202) 331-1010

Co-counsel for Amicus Curiae
Competitive Enterprise Institute

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INTEREST OF AMICI CURIAE[1]

Amici State National Bank of Big Spring, the Competitive Enterprise Institute, and the 60 Plus Association, Inc. are plaintiffs in a separate lawsuit challenging the constitutionality of the President's appointment of Richard Cordray, without the Senate's advice and consent, to be Director of the newly created Consumer Financial Protection Bureau (CFPB).[2] Cordray's appointment occurred on the same day as the National Labor Relations Board (NLRB) appointments at issue in this case, and therefore the merits of *amici*'s claim in their own case may be affected by the Court's decision here.

State National Bank is a community bank that has served Big Spring, Texas and other communities for over a century. The Competitive Enterprise Institute (CEI) is a nonprofit organization dedicated to advancing the principles of individual liberty, limited government, and free enterprise. Towards those ends, CEI engages in research, education, and advocacy efforts involving a broad range of regulatory, trade, and legal issues. CEI also has

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund to its preparation or submission.

[2] *State Nat'l Bank of Big Spring* v. *Lew*, No. 1:12-cv-1032 (D.D.C. filed June 21, 2012), *appeal docketed*, No. 13-5247 (D.C. Cir. filed Aug. 2, 2013). The plaintiffs also raise a separation-of-powers challenge to the CFPB in that case.

participated in cases before this Court or lower federal courts that raised select constitutional or statutory issues. See, *e.g.*, *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010). The 60 Plus Association is a non-profit, non-partisan seniors advocacy group devoted to advancing free markets.

INTRODUCTION

On January 4, 2012, the President appointed more than just the three NLRB members at issue in this case. He also appointed Richard Cordray to be the first Director of the newly created Consumer Financial Protection Bureau (CFPB). And as with his NLRB appointments, he appointed Cordray to the CFPB without the Senate's advice and consent. See Resp. Br. 69; U.S. Const. art. II, § 2.

That appointment's relevance to this case is greater than just its timing and nature. Rather, the CFPB's structure casts this case's constitutional issue into even sharper relief. Because the CFPB enjoys "full independence" from Congress's power of the purse, see *infra* p. 5, the Senate's confirmation process is Congress's last tool for "assuring properly functioning regulatory agencies," S. Comm. on Gov't Operations, 95th Cong. 1st Sess., 2 Study on Federal Regulations: Congressional Oversight of Regulatory Agencies 58 (1977).

Accordingly, if presidents are able to evade the Senate's confirmation process by simply deeming the Senate to be in an intra-session recess, then Congress will lose much more than just its say in individual appointments. Congress will lose its last

substantive tool for overseeing the new generation of self-funded independent agencies.

BACKGROUND

The President appointed Richard Cordray to be the CFPB's first Director, without the Senate's advice and consent. He appointed Cordray without Senate confirmation not because the Senate was "unavailable to offer its advice and consent," Pet'r Br. 19, but because, as he said then, "I refuse to take no for an answer," Resp. Br. 69.

Having been appointed without Senate advice and consent, Cordray assumed control of an agency that was structured to be just as free from congressional oversight as his appointment was, as explained below.

A. The Self-Funded CFPB: An Overview

The CFPB was created in 2010 by Title X of the Dodd-Frank Act.[3] Dodd-Frank vested the CFPB with exclusive jurisdiction to administer myriad "Federal consumer financial law[s]" previously administered by other agencies. 12 U.S.C. §§ 5481(12) & (14), 5511. And Dodd-Frank further vested the CFPB with newly created authority to regulate or prosecute "unfair, deceptive, or abusive" consumer lending practices. *Id.* § 5531(a).

The CFPB is an "independent bureau" within the Federal Reserve System. *Id.* § 5491(a); see also

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[3] Formally, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

44 U.S.C. § 3502(5) (designating the CFPB as an "independent regulatory agency," and thus excluding it from E.O. 12866's process for regulatory review by the Office of Management and Budget). And the CFPB's Director enjoys the "defining hallmark of an independent agency": the President cannot remove him except "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 16 (2010) ("defining hallmark").

Going beyond mere protection against removal by the President, Dodd-Frank took still further steps to promote the CFPB Director's independence and discretion. Eschewing the traditional, bipartisan "independent commission" model, in which several commissioners check and balance each other,[4] the Act vested the agency's power in a single director. 12 U.S.C. § 5491(b)(1). And the Act would have courts give *Chevron* deference to the CFPB's interpretation of statutes that it does not exclusively administer, *id.* § 5512(b)(4)(B), even though such deference ordinarily is inappropriate in such cases, *Proffitt* v. *FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000).

But the CFPB's most important "independence," for purposes of this case, is its independence from Congress's power of the purse. Instead of relying on congressional appropriations to fund its activities,

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[4] See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 794 (2013) (describing benefits of independent commissions' multimember structure).

the CFPB is statutorily entitled to claim nearly $600 million annually from the Federal Reserve System.[5] Congress is prohibited even from attempting to "*review*" the CFPB's non-appropriated budget. 12 U.S.C. § 5497(a)(2)(C) (emphasis added).

Dodd-Frank sets the CFPB outside of Congress's appropriations process precisely to minimize Congress's influence over the agency. In first proposing the CFPB, the Executive Branch called for the agency to have a "stable and robust . . . funding stream" outside of congressional appropriations. Treasury Dep't, *Financial Regulation Reform—A New Foundation: Rebuilding Financial Supervision and Regulation* 58 (2009). The Senate Banking Committee, in turn, agreed that making the CFPB "independent of the Congressional appropriations process" was "absolutely essential" to prevent future Congresses from influencing the CFPB. S. Rep. No. 111-176, at 163 (2010).

The agency agrees. It stressed in a recent report that its statutory entitlement to "funding outside the congressional appropriations process" ensures its "*full independence*" from Congress. CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report* 81 (Apr. 2013) (emphasis added) (hereinafter, *CFPB Strategic Plan*).

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[5] Specifically, the CFPB is entitled to up to 12 percent of Federal Reserve's operating expenses. 12 U.S.C. § 5497(a) According to the CFPB, this equals "approximately $598 million." CFPB, *FY 2013 Budget Justification* 7 (2012).

B. The CFPB Director: Appointed Without Senate Advice and Consent

Dodd-Frank did leave Congress one power over the CFPB, by providing that the agency would not receive its full powers until the CFPB's first Director was nominated by the President and "confirmed" by the Senate. 12 U.S.C. § 5586(a); see also *id.* § 5491 ("the Director shall be appointed by the President, by and with the advice and consent of the Senate"). Despite those requirements, the President appointed Cordray as CFPB Director without the Senate's advice and consent, Resp. Br. 69, after the Senate voted to deny "cloture" on his nomination, 157 Cong. Rec. S8422, S8428-S8429 (Dec. 8, 2011).

Under Cordray, the CFPB promulgated consequential rules governing everything from wire transfers to lending standards to mortgage servicing procedures.[6] Cordray held this office without Senate confirmation for eighteen months, when the President and Senators struck a deal for Cordray's confirmation (and that of five NLRB members).

Director Cordray later published a "Notice of Ratification" in the *Federal Register*, asserting that the actions he took during his original, unconfirmed appointment "were legally authorized and entirely

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[6] See, *e.g.*, *Electronic Fund Transfers (Regulation E)*, 77 Fed. Reg. 6194 (Feb. 7, 2012); *Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z)*, 78 Fed. Reg. 6408 (Jan. 30, 2013); *Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X)*, 78 Fed. Reg. 10696 (Feb. 14, 2013).

proper," but that in order to "avoid any possible uncertainty, however, I hereby affirm and ratify any and all actions I took during that period." *Notice of Ratification*, 78 Fed. Reg. 53734 (Aug. 20, 2013).

SUMMARY OF ARGUMENT

The Appointments Clause "serves both to curb Executive abuses of the appointment power . . . and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Edmond* v. *United States*, 520 U.S. 651, 659 (1997) (quoting The Federalist No. 76) (Alexander Hamilton). Ordinarily, the Senate confirmation process is just one way that Congress oversees the administrative state; the Appropriations Power provides another. See Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA:* Quis Custodiet Ipsos Custodes *(Who Shall Watch The Watchers Themselves)?*, 54 L. & Contemp. Probs. 205, 210 (1991).

Of course, the Appropriations Power is far more effective than the Advice-and-Consent Power, in terms of its capacity to meaningfully check the administrative agencies. See Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822, 1834-36 (2012); *id.* at 1835 ("A more critical weakness of appointment is that it serves only as an ex ante tool of control.") (hereinafter, *The Importance of Appointment*).

But when Congress loses its power of the purse over an agency, then the Appointments Clause, limited as it is, becomes Congress's *last* substantive oversight power for that agency. If presidents can

evade the confirmation process by deeming the Senate to be in "recess" and appointing nominees unilaterally, then Congress will have lost even this last, limited means of oversight.

Finally, the Senate has not "acquiesced" to the Executive's unprecedented assertion of unilateral appointment power. More importantly, such focus on alleged congressional "acquiescence" ignores the fact that the "separation of powers does not depend on . . . whether 'the encroached-upon branch approves the encroachment.'" *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010). "Neither Congress nor the Executive can agree to waive" the Appointments Clause's "structural protection," *Freytag* v. *Comm'r of Internal Revenue*, 501 U.S. 868, 880 (1991).

ARGUMENT

I. The Senate's Advice-And-Consent Power Is Congress's Last Oversight Tool For Self-Funded Independent Agencies

A. As More Agencies Are Freed From The "Power of the Purse," Congressional Oversight By Other Means Is Ever More Crucial

According to the CFPB's proponents, the agency's freedom from Congress's Appropriations Power is "absolutely essential" to the agency's independence from Congress. S. Rep. No. 111-176, at 163 (2010). But other analysts no less qualified—such as the Framers—would characterize regulators' "full independence" from Congress, *CFPB Strategic Plan* at 81, in much less charitable terms.

The Framers recognized that Congress's "power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58 (James Madison). "The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist 'the overgrown prerogatives of the other branches of government.'" *Noel Canning* v. *NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013) (quoting Federalist No. 58).

The Senate itself has stressed this point, too. "The appropriations process is the most potent form of Congressional oversight, particularly with regard to the federal regulatory agencies." S. Comm. on Gov't Operations, 95th Cong. 1st Sess., 2 Study on Federal Regulations: Congressional Oversight of Regulatory Agencies 42 (1977); see also Curtis W. Copeland, Cong. Research Serv., *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions* 2 (Aug. 5, 2008) ("Compared to the other congressional methods of influence, appropriations provisions related to agency rulemaking and regulatory activity have received comparatively little attention by scholars and analysts, but those provisions can have substantial effects on public policy.").

Myriad scholars agree.[7] Thus, as scholars have focused in recent years on ways in which agencies can be made independent (or, "insulated") from Congress's oversight, they have recognized that a "more powerful" way for agencies to be freed from Congress's influence "is to provide agencies with an

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[7] "The most constant and effective control which Congress can exercise over an independent regulatory commission is financial control. . . . Viewed broadly, the financial control exercised by Congress over the commissions is a necessary and desirable form of supervision." Robert E. Cushman, *The Independent Regulatory Commissions* 674-75 (1972). See also Jack M. Beermann, *Congressional Administration*, 43 San. Diego. L. Rev. 61, 84-90 (2006); *id.* at 84 ("One way in which Congress has supervised agencies with great particularity, both formally and informally, is through the appropriations process."); Datla & Revesz, *supra* note 4, at 816 ("Congress primarily exerts influence over agency heads . . . through the power of the purse. Thus '[an] agency has an incentive to shade its policy choice toward the legislature's ideal point to take advantage of that inducement.'" (alteration in original) (quoting Randall L. Calvert *et al.*, *A Theory of Political Control and Agency Discretion*, 33 Am. J. Pol. Sci. 588, 602 (1989))); Arthur W. Macmahon, *Congressional Oversight of Administration: The Power of the Purse I*, 58 Pol. Sci. Q. 161, 173 (1943) ("Through [the appropriations committees] is accomplished most of the oversight that Congress exercises over administration."); Arthur W. Macmahon, *Congressional Oversight of Administration: The Power of the Purse II*, 58 Pol. Sci. Q. 380, 413-14 (1943) ("Fitful legislative intervention is no substitute for controls within administration. The most valuable contribution of legislative oversight is to galvanize the disciplines of administration itself").

independent funding source . . . . With independent funding, the agency is insulated from Congress as well as the President." Barkow, *Insulating Agencies*, 89 Tex. L. Rev. at 42.[8]

The loss of that constitutional check and balance is not ameliorated by the fact that a single Congress helped to pass the statute eliminating Congress's power of the purse over the agency. After all, an individual Congress, like an individual President, "might find advantages in tying [its] own hands." *Free Enter. Fund*, 130 S. Ct. at 3155; see also James Q. Wilson, *Bureaucracy* 239 (1989) ("[P]oliticians have had good reasons to tie their own hands. But once tied, they cannot easily be untied."). "But the separation of powers does not depend on the views of individual Presidents," or on individual Congresses. 130 S. Ct. at 3155. A single Congress "cannot . . . choose to bind [its] successors by diminishing [its] powers." *Id.*

The CFPB is perhaps the most prominent agency to have been freed from Congress's power of

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[8] See also Charles Kruly, *Self-Funding and Agency Independence*, 81 Geo. Wash. L. Rev. 1733 (2013); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 Vand. L. Rev. 599, 611 (2010) ("Several of the financial independent agencies have funding sources, usually from users and industry, which frees them from depending on congressional appropriations and annual budgets developed by the executive branch."); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822 (2012).

the purse, but it is not alone. The Public Company Accounting Oversight Board, too, enjoys "a revenue stream independent of the congressional appropriations process," in order to "insulate the Board from congressional . . . influences." *Free Enter. Fund*, 130 S. Ct. at 3174 (Breyer, J., dissenting); see also Kruly, *Self-Funding and Agency Independence*, 81 Geo. Wash. L. Rev. at 1735 (listing self-funded agencies). Meanwhile, incumbent agencies pine for such fiscal independence from Congress. See, *e.g.*, Gina Chon, *CFTC Can Self-Fund Via Fines, Says Chief*, Financial Times, Oct. 9, 2013, at 14 ("[Commissioner Chilton] has called on lawmakers to alter the way the CFTC is funded, an argument supported by CFTC chairman Gary Gensler"); Mary L. Schapiro, Chairman, Securities and Exchange Comm'n, *Statement Concerning Agency Self-Funding* (Apr. 15, 2010) (arguing that "self funding ensures independence").

When a Congress gives up the Legislative Branch's power of the purse over an agency, future Congresses lose their ability to put weight behind their oversight of the agency. This, too, is exemplified by the CFPB. While the CFPB may appear before congressional committees, submit reports to Congress, and undergo audits by the Government Accountability Office, see 12 U.S.C. §§ 5496-5496a, it faces no serious consequences for refusing to respond meaningfully to Congress's inquiries. Congressmen and Senators can write letters to the CFPB, complaining that the agency is "wholly unresponsive

to our requests for additional budget information,"[9] or that the agency "has yet to explain its basis for" controversial policies.[10] At hearings, Congress can criticize the agency's failure to answer questions about its secret "data gathering activities".[11] But without the Appropriations Power, Congress has few tools left to put true weight behind its oversight activities.[12] In such cases, the Senate's Advice-and-

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[9] Letter from Rep. Randy Neugebauer, Chairman, H.R. Comm. on Fin. Servs., Subcomm. on Oversight and Investigations, *et al.* to Richard Cordray, Director of the CFPB, at 1 (May 2, 2012).

[10] Letter from Sen. Rob Portman, *et al.* to Richard Cordray, Director of the CFPB, at 1 (Oct. 30, 2013) (bipartisan coalition of twenty-two Senators write that the CFPB "has yet to explain its basis for" the agency's conclusion that "disparate impact" discrimination is present in certain auto loans).

[11] Rachel Witkowski, *Lawmakers Fume Over Unanswered Questions to CFPB*, Am. Banker (online) (Sept. 12, 2013) ("Lawmakers blasted the Consumer Financial Protection Bureau on Thursday, claiming it had failed to respond to questions lawmakers have about its data gathering activities. During the CFPB's semi-annual report to the House Financial Services Committee, lawmakers demanded to know why the agency's director, Richard Cordray, and his staff have not yet answered roughly 200 questions sent to the agency . . . .").

[12] The Impeachment Power for example, is no alternative to the Appropriations Power or Advice-and-Consent Power, because impeachment is not available for matters of maladministration not rising to the extraordinary level of "Treason, Bribery, or other high Crimes and

Consent Power stands as Congress's last, limited tool for overseeing the administrative state.

B. When Agencies Are Unchecked By The Appropriations Power, The Senate's Advice-And-Consent Power Becomes Congress's Last, Limited Means For Overseeing The Administrative State

The Senate's Advice-and-Consent Power's purpose and utility extend beyond any individual nomination and appointment. While the Senate confirmation process's *ex ante* nature prevents it from rivaling the Appropriations Power as Congress's primary check on administrative agencies, *see The Importance of Appointment*, *supra*, 125 Harv. L. Rev. at 1834-36, the Advice-and-Consent Power remains "an efficacious source of stability in the administration." The Federalist No. 76 (Alexander Hamilton).

To that end, Judge Friendly observed that the Senate's review of the President's nominations offered the opportunity for "a more positive role" in overseeing the administrative state—"not in pushing particular candidates, which is the executive's responsibility, but in maintaining standards" for the President to heed in making nominations. Henry J. Friendly, *A Look at the Federal Administrative Agencies*, 60 Colum. L. Rev. 429, 445 (1960); cf. Henry J. Friendly, *The Federal Administrative Agencies* 166 (1962) ("I cannot follow this conception

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Misdemeanors." *Bowsher* v. *Synar*, 478 U.S. 714, 729-30 (1986).

of the agencies as satellites which, once having put them in orbit, Congress may not deflect.").

Of course, Judge Friendly recognized the Senate confirmation process's practical limits as a tool for overseeing agencies. In its advice-and-consent role, the Senate "must exercise its essential functions of oversight and criticism with caution and restraint." 60 Colum. L. Rev. at 445. But at the very least, the confirmation process allows the Senate to "look at how the agency is doing its job in general[.]" *Id.*

But, he added, while the Senate might reject nominees sparingly, "that prerogative is not to be relinquished[.]" *Id.* Even if it "seldom rejects a nominee," Professors Pierce and Shapiro explain, Congress still "uses confirmation hearings as an opportunity to review an agency's policies and performance, to emphasize the agency's responsibility to Congress, and to seek to force the nominee to indicate his substantive views about the direction of the agency." Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 Tex. L. Rev. 1175, 1199 n.142 (1981); see also Beermann, *Congressional Administration*, 43 San Diego L. Rev. at 111 ("The choice of which officials to subject to the advice and consent process is also reflective of Congress's interest in the execution of the laws.").

Again, these oversight functions of the Senate confirmation process are limited—far more limited than Congress's potent power of the purse. But where Congress's purse has no power over an agency, the Senate confirmation process allows the Senate at least some opportunity to oversee the administrative state. If presidents can unilaterally deem the Senate

to be in a "recess" and appoint officers without the Senate's advice and consent, then even this last, limited oversight tool is lost.

II. The Senate Has Not "Acquiesced"—Nor Could It "Acquiesce"—To The Executive's Unprecedented Recess Appointments

The Executive defends its interpretation of the Recess Appointments Clause by invoking "long-established practice"—that is, the history of dealings between the President and the Senate. Pet'r Br. 21-28. The Executive alleges that Congress showed "acquiescence" in the President's appointments by passing the Pay Act to allow for payment to recess appointees who were appointed during intra-session recesses. See, *e.g.*, *id.* at 36-37; but see Resp. Br. 28-29 (rebutting that interpretation of the Pay Act).[13]

But as the Respondent explains, the "authority" claimed by the Executive "has not been 'accepted'" by the Senate; rather, the "Executive's current position is simply the latest in a string of increasingly aggressive assertions of mid-Session recess-appointment power." Resp. Br. 26; *see generally id.* at 25-30. The Executive's practice "has consistently evolved," *id.* at 26, and it will continue to evolve in

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[13] But the Pay Act applies only to recess appointments to agencies funded "from the Treasury of the United States[.]" 5 U.S.C. § 5503(a). That would not appear to include the CFPB, which receives its funds from the Federal Reserve System, not the Treasury. 12 U.S.C. § 5497(a); see also *id.* § 5497(c)(2) ("Funds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies.").

ever more aggressive directions. This is clearest in the Executive's express refusal to concede *any* lower limit to how brief an adjournment might be yet still constitute a "recess." OLC, *Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions*, 36 Op. O.L.C. ___, slip op. at 9 n.13 (Jan. 6, 2012) ("there is no lower time limit that a recess must meet to trigger the recess appointment power"). While the Executive refuses to draw a line, the courts must respect the line already drawn by the Constitution's original public meaning and reject the President's unprecedented "recess" appointments.

Ultimately, the Executive's allegations of "congressional acquiescence" reflect not just a misrepresentation of facts, but also a much more fundamental misunderstanding of principle. The Senate cannot "acquiesce" in unconfirmed appointments outside of "the Recess of the Senate." Just as "the separation of powers does not depend on . . . whether 'the encroached-upon branch approves the encroachment,'" *Free Enter. Fund*, 130 S. Ct. at 3155, "[n]either Congress nor the Executive can agree to waive" the Appointments Clause's "structural protection," *Freytag*, 501 U.S. at 880.

"The structural interests protected by the Appointments Clause are not those of any one branch of Government but of the entire Republic." *Id.* They deserve this Court's protection.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

GREGORY JACOB
KATHRYN E. TARBERT
O'MELVENY & MYERS LLP
1625 I St. NW
Washington, DC 20006
(202) 383-5300

C. BOYDEN GRAY
ADAM J. WHITE
Counsel of Record
BOYDEN GRAY & ASSOCIATES
1627 I Street NW, Suite 950
Washington, DC 20006
(202) 955-0620
adam@boydengrayassociates.com

Counsel for Amici Curiae

SAM KAZMAN
HANS BADER
COMPETITIVE ENTERPRISE INSTITUTE
1899 L St. NW, Floor 12
Washington, DC 20036
(202) 331-1010

Co-Counsel for Amicus Curiae
Competitive Enterprise Institute

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AMICUS CURIAE BRIEF

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In The

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NOEL CANNING, A DIVISION OF THE NOEL CORP., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

AMICUS CURIAE BRIEF OF PROFESSOR VICTOR WILLIAMS IN SUPPORT OF PETITIONER AND URGING REVERSAL

VICTOR WILLIAMS
Counsel of Record
Faculty Suite 480
COLUMBUS SCHOOL OF LAW
CATHOLIC UNIVERSITY OF AMERICA
Washington, D.C. 20064
(202) 319-5559
williamv@law.edu

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE *AMICUS CURIAE*

Victor Williams, of Catholic University of America's Columbus School of Law, writes, in support of the Petitioner.[1] Professor Williams was granted leave to appear below as *amicus* in *Noel Canning v. NLRB* to raise a nonjusticiability alternative theory. He has also appeared as *amicus* in related cases before the Third Circuit and Seventh Circuit. Professor Williams has researched and published in the area of constitutional law and the federal appointments process for twenty-two years. *Amicus'* published scholarship and popular commentary has strongly supported the appointment prerogatives of four Presidents without regard to their party affiliation. *Amicus* has warned of worsening cycles of Senate confirmation dysfunction, and has been particularly critical of the recent purposeful appointment obstruction orchestrated by partisan factions of both the House and Senate. Throughout 2011, Professor Williams advocated for President Barack Obama to use his Article II, Section 2, Clause 3 appointment authority to challenge the appointment obstruction and insure legal authority for the National Labor Relations Board (NLRB) and Consumer Financial Protection Bureau (CFPB). *Amicus* seeks to prompt a nonjusticiability inquiry

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[1] All parties have consented. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief. *Amicus'* institutional affiliation is provided only for identification purposes.

and argues for reversal of the court of appeals. An earlier version of this *amicus* brief was lodged in support of the Petition for a Writ of Certiorari.[2]

SUMMARY OF ARGUMENT

Without duplication, *amicus* fully endorses Petitioner's reasons for this Court to reverse the court below. *Amicus* offers an alternative theory: Noel Canning's (hereafter "Respondent") challenge to the President's discretionary exercise of his recess appointment powers is a nonjusticiable political question.

Article II, Section 2, Clause 3 is a textual commitment of exclusive authority to the President. This textual commitment recognizes that only the Executive has the institutional competence to know when such discretionary appointment action is required to meet his Article II, Section 3 obligation: "[H]e shall take Care that the Laws be faithfully executed, and

[2] This updated and expanded amicus brief differs from the certiorari stage brief primarily in the Summary of Argument (additional paragraphs added at the end), part IV (additional part added advancing Alexander Bickel's abstention theory), and part VI (additional part added alternatively arguing for judicial invalidation of confirmation filibusters and holds). It removes reference to Oliver Wendell Holmes, Jr.'s appointment to the Supreme Court. Although President Theodore Roosevelt tendered Holmes a recess appointment, Holmes retained his Chief Justice post on the Massachusetts Supreme Judicial Court until after his Senate confirmation.

shall Commission all the Officers of the United States."

The textual commitment of authority grants the Executive both the responsibility to determine Senate unavailability and the discretion to sign temporary commissions. Alexander Hamilton explained in *Federalist 67* that Clause 3 is "intended to authorize the President *singly* to make temporary appointments." *The Federalist No. 67*, at 455 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis in original).

If this Court goes beyond the textual commitment of exclusive authority to the President, it will find itself entering the densest of modern political thickets. Cycles of partisan appointment obstruction and subsequent partisan payback have worsened over each of the past four presidencies. During the first years of the Obama Administration, partisan confirmation obstruction by minority factions reached unprecedented intensity.[3] The political and economic harm of appointment obstruction is significant. Executive departments critical to economic and national security interests have suffered years without leadership. Regulatory agencies have long-standing vacancies and the independent judiciary

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[3] *See* Victor Williams and Nicola Sanchez, *Confirmation Combat*, Nat'l L.J. 34 (Jan. 4, 2010).

struggles with many empty benches and caseload emergencies.[4]

The express goal of the minority obstruction, particularly as directed against the 2011 NLRB and CFPB nominees, was nullification: Extinguish the independent agencies' legal authority by preventing timely appointments.[5] The Senate's ongoing internal conflict has so escalated, and the lodging of holds and filibusters is so frequent, that Majority Leader Harry Reid publicly praises the President for his recess appointments and requests that the President "recess appoint all" nominees being denied up-or-down votes by minority factions.[6]

If this Court's review goes beyond the exclusive textual commitment of authority to the President, it must also examine the constitutionality of the underlying obstruction. It would be a strange justice "to let a *minority* of the Senate escape judicial review of

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[4] *See* Russell Wheeler, *Is Our Dysfunctional Process for Filling Judicial Vacancies an Insoluble Problem?*, ACS Issue Brief, Jan. 24, 2013, http://www.acslaw.org/sites/default/files/Wheeler_-_Filling_Judicial_Vacancies.pdf.

[5] *See* Ylan Q. Mui, *McConnell To Block 'Any Nominee' for Top CFPB Job*, Wash. Post, June 10, 2011, at A12; *see also*, Victor Williams, *NLRB and CFPB Recess Appointments: Obama's New Year's Options*, Huffington Post (Dec. 28, 2011), http://www.huffingtonpost.com/victor-williams/nlrb-and-cfpb-recess-appo_b_1169657.html.

[6] Seung Min Kim, *Senate Gridlocked Over Nominations, Again*, Politico, Feb. 17, 2012, http://www.politico.com/news/stories/0212/73038.html.

its arguably unconstitutional obstruction, while subjecting to judicial review the President's response – acquiesced in by the Senate majority – to that obstruction."[7] When a minority of just one Senator lodges a hold or a filibuster threat, the Appointment Clause's simple-majority Senate vote requirement is effectively amended to compel a predicate supermajority cloture vote.[8]

This Court would need to also examine the House majority and Senate minority scheduling collusion designed to withhold adjournment consent to the upper chamber for the purpose of keeping the Senate in pro forma sessions. With obstructionists promoting the myth that a three-day recess minimum was needed to trigger Clause 3 authority, prior sham Senate sessions had been used to bluff the Executive out of using the temporary appointment authority.[9] The specific objective of the 2011 scheduling gimmick was to block the President from responding to the

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[7] Edwin Meese, III, et al., En Banc Amici Brief in *Evans v. Stephens*, 2004 WL 3589823, 9 (emphasis in original).

[8] *See generally*, Tom Harkin, *Filibuster Reform: Curbing Abuse to Prevent Minority Tyranny in Senate*, 14 N.Y.U. J. Legis. & Pub. Pol'y 1 (2011); Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 Conn. L. Rev. 1041 (2011); and John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 Harv. J. L. & Pub. Pol'y 181 (2003).

[9] *See* Victor Williams, *Pro Forma Follies: Obama's Recess Appointment Authority Not Limited by Sham Sessions*, Nat'l L.J. 51 (Oct. 11, 2010); Victor Williams, *Averting a Crisis: The Next President's Appointment Strategy*, Nat'l L.J. 14 (Mar. 10, 2008).

prolonged confirmation tribulation of NLRB nominee Craig Becker. The President called the obstructionists' bluff, recess commissioned three Board members, including a replacement for Becker – thus restoring the legal authority of the NLRB.[10]

This adjudication is a direct continuation of the ongoing political conflict. In a bold frontal assault, congressional obstructionists appeared as *amici* and participated in oral argument below. This action attempts to draft the judiciary to actively participate in the political combat.

If this Court's review goes beyond the exclusive textual commitment to the President, it will find no judicially manageable standards to resolve the escalating campaign of appointment obstruction or to measure the deference due to the Senate, if any, when the President signs temporary appointments.[11] Judicial review of the President's recess appointment

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[10] *See* Laurence H. Tribe, *Games and Gimmicks in the Senate*, N.Y. Times, A25 (Jan. 5, 2012) ("The Constitution that has guided our Republic for centuries is not blind to the threat of Congress's extending its internal squabbles into a general paralysis of the entire body politic, rendering vital regulatory agencies headless and therefore impotent. Preserving the authority the president needs to carry out his basic duties, rather than deferring to partisan games and gimmicks, is our Constitution's clear command.").

[11] A recent challenge to the Senate's use of the filibuster was analyzed as presenting a nonjusticiable political question based on the three *Baker* criteria argued in this brief. *Common Cause v. Biden*, 909 F. Supp. 2d 9 (D.D.C. 2012).

discretion is also disrespectful and conflictive; the judiciary should not be the final arbiter of the appointment method by which Presidents have strategically benched judges in order to transform courts.

If the Court is not moved to a nonjusticiability determination after applying its own political-question precedent, *amicus* asks that it consider a less "domesticated" abstention perspective; "something greatly more flexible, something of prudence, not construction and not principle." Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962). And, if the Court ultimately rejects both precedent and prudence to reach the merits of the challenge, the predicate congressional appointment obstruction – including the use of confirmation holds and filibusters – must be reviewed.

Respondent Noel Canning opened the door wider for such an expanded review by requesting the additional question presented regarding the Senate pro forma sessions. *Amici* Mitch McConnell and all other Senate Republican Conference members, supporting the Respondent, similarly advocated review of all aspects of the controversy. *Amici* Senators argued that the Court "should consider that question in its entirety, with all antecedent and subsidiary issues on the table." Sen. Republican Leader Mitch McConnell and 44 Other Senators Certiorari *Amicus* Br. 5.

This Court should *either* determine the Respondent's challenge to be nonjusticiable; *or* fully reach all aspects of the merits to *both* reaffirm the Executive's

recess appointment power and invalidate Senate confirmation holds and filibusters requiring unconstitutional supermajority cloture votes.

ARGUMENT

Introduction: Political – Not Legal – Questions

Chief Justice John Marshall provided early guidance[12] regarding political-question nonjusticiability: "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." *Marbury v. Madison*, 5 U.S. 137, 165 (1803). Marshall continued: "Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Id.* at 170. Throughout our Republic's history, this Court has recognized that some constitutional questions are committed by the Constitution to the discretion of the

[12] Three years before his *Marbury* opinion, Congressman John Marshall provided earlier guidance when explaining to his House colleagues that some constitutional questions should only be answered by the elected political Branches. Without such a jurisdictional limit, the political departments "would be swallowed up by the judiciary." Speech of the Honorable John Marshall (Mar. 7, 1800), 18 U.S. app. note I, at 16-17 (1820) (cited by *The Political Question Doctrine and the Supreme Court of the United States* (Nada Mourtada-Sabbah and Bruce E. Cain eds., 25 n.10, 2007)).

elected political Branches. *See, e.g.*, *Luther v. Borden*, 48 U.S. 1 (1849); *Pacific States Tel. Co. v. Oregon*, 223 U.S. 118 (1912); *Coleman v. Miller*, 307 U.S. 433 (1939); *Gilligan v. Morgan*, 413 U.S. 1 (1973).

Associate Justice Sonia Sotomayor most recently reiterated the fundamental jurisdictional principle as it has been developed in such modern cases as *Baker v. Carr*, 369 U.S. 186 (1962); *Goldwater v. Carter*, 444 U.S. 996 (1979) and *Nixon v. United States*, 506 U.S. 224 (1993). She described how "[t]he political question doctrine speaks to an amalgam of circumstances in which courts properly examine whether a particular suit is justiciable – that is, whether the dispute is appropriate for resolution by courts." *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1431 (2012) (Sotomayor, J., concurring). In agreeing with the Court's holding that interpretation of a statute merely regulating a passport's contents did not present a political question, Justice Sotomayor focused on *Baker v. Carr* to emphasize the "demanding" inquiry required in a nonjusticiability analysis.

Baker serves as a helpful doctrinal guide for such inquiry as it numerates both classical and prudential strains of judicial abstention. The "separation of power function" is identified "as the common element among the many possible formulations of a political question." 369 U.S. at 210. *Baker* identified six characteristics "[p]rominent on the surface of any case held to involve a political question," including, as most relevant here, "a textually demonstrable constitutional commitment of the issue to a coordinate

political department." 369 U.S. at 217. The doctrine also precludes judicial review of an issue where there is a "lack of judicially discoverable and manageable standards for resolving it," or when it is impossible for the court to undertake "independent resolution without expressing lack of the respect due coordinate branches of government." *Id.*

Nixon v. United States applied *Baker* by instructing that a political question analysis begins with determining "whether and to what extent the issue is textually committed." 506 U.S. at 228.

The drafting, ratification, and structural logic of Article II, Section 2 prove that the textual commitment of temporary appointment discretion to the Executive is absolute. Additional interrelated prudential factors strongly support that nonjusticiable determination.

I. Textual Commitment to Executive Alone: Recess Appointment Power was Capstone of Framers' Design for Presidential Predominance in Appointments

Framing the 1787 Philadelphia debate regarding appointments were the unhappy experiences of most of the independent states, which had constitutions mandating that state legislatures appoint officials and judges. "The appointing authority which in most constitutions had been granted to the assemblies had become the principal source of division and faction in the states." Gordon Wood, *The Creation of*

the American Republic, 1776-1787, 407 (1969). The Convention's delegates repeatedly considered, and ultimately rejected, all proposals to give the Congress as a whole, or, alternatively, the Senate alone, significant appointment authority. *See Freytag v. Commissioner*, 501 U.S. 868, 904-08 (1991) (Scalia, J., concurring.); *Buckley v. Valeo*, 424 U.S. 1, 129 (1976) (per curiam).

A. Presidential Predominance in Appointments

As the state legislature appointment processes "had fallen easy prey to demagogues, provincialism, and factions," the 1787 Philadelphia Convention delegates "quickly accepted the desirability of a significant Presidential role in making federal appointments." Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis*, 18 (2003).

The Convention's final summer judgment was to grant the President a predominant authority over appointments while restricting the Senate to an advisory consent vote to principal officer nominations. The term "Advice" should be read as conjoined with its companion term "Consent"; the Senate advises the President only by its final consensual vote. Such a final vote remains only advisory as the President

retains absolute discretion to decide whether to sign the commission.[13]

Obvious by the Recess Appointment Clause's structural logic and functional purpose, the Senate was to have no role in, or interference with, the signing of recess commissions.[14] A Senate unavailable to render advisory consent is unavailable to advise as to its availability. The two appointment clauses which separately issue a "shall have Power" charge to the President are the method for his Article II, Section 3 "take Care" and "Commission all officers" obligation.

In *Federalist* writings, Alexander Hamilton favorably described – with "particular commendation" – the creation of a strong appointment authority in the Executive "to promote a judicious choice of men for filling the offices of the Union." *The Federalist No. 76*, at 510-11 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). In explaining the Convention's final

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[13] Contrary to a significant quantity of commentary arguing for an enlargement of the Senate's role beyond this textual grant, Professor John McGinnis supports an accurately narrow reading of "Advice and Consent" by both textual analysis and reference to early practice. *See* John O. McGinnis, *The President, the Senate, the Constitution and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 Tex. L. Rev. 633 (1993).

[14] Just as with temporary appointments for principal officers, the Senate has no advisory consent function regarding "inferior Officer" appointments once legislation vests appointment authority "in the President alone, in the Courts of Law, or in heads of Departments."

decision to restrict the Senate's role to a ratification vote, Hamilton explained that any legislative assembly's "systematic spirit of cabal and intrigue" was incompatible with appointment power. *Id.* at 510.

Hamilton contrasted appointment by a "single well-directed" person who would not "be distracted and warped by that diversity of views, feelings, and interests, which frequently distract and warp the resolutions of a collective body." *Id.* at 511. While Hamilton promised that the Senate's advisory consent would serve as an "excellent check" on improper presidential favoritism, he too optimistically assumed "Senate co-operation" done in a "silent operation." *Id.*

Hamilton affirmed that the House of Representatives should have no appointment role. In *Federalist No. 77*, Hamilton felt obliged to take notice of a "scheme" advocated by "just a few" to give the House influence in the appointment process. *The Federalist No. 77* at 519 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton accurately predicted that House appointment involvement would manifest "infinite delays and embarrassments." *Id.*

B. Recess Appointment Authority as the Capstone of Presidential Predominance in Appointments

The capstone of the Philadelphia Convention's design to give the President a predominant authority

in appointments came from North Carolina Delegate Richard Dobbs Spaight.[15] During the most critical day of the long summer's many debates regarding appointments, the final accord was struck for ordinary appointments by restricting the Senate's role to simple-majority vote ratification. Spaight then moved to grant the President unilateral appointment authority when the Senate was unavailable to attend to its advisory consent duty. The delegates immediately and unanimously accepted the grant of exclusive term appointment authority for the President. 2 *The Records of the Federal Constitutional Convention of 1798*, 539 (Max Farrand ed., 1966).

Spaight's motion prompted no additional Convention debate; it was integral to the delegates' structural and functional design for Executive appointment authority. The appointment authority would remain vested and operable at all times for all purposes – regardless of the Senate's attendance to its duties. It was a "power of appointment lodged in a President . . . to be exercised independently, and not pursuant to the manipulations of Congress." *Freytag v. Commissioner*, 501 U.S. at 907 (Scalia, J., concurring).

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[15] Richard Spaight is better known to legal history for communicating with James Iredell urging judicial restraint and judicial deference to the political Branches. *See Letter from Richard Dobbs Spaight to James Iredell* (Aug. 12, 1787), in 2 Life and Correspondence of James Iredell, at 168, 169-70 (Griffith J. McRee ed., 1858).

C. Framers' Functional Efficiencies and Structural Limitations for Temporary Appointments: Allowing "Play in the Joints"

The core purpose of the 1787 Convention was to redesign the central government to better address the problems of a new nation. The Framers sought to remedy the chief institutional defect in the Articles of Confederation by formally separating executive authority from the Congress. Edmund S. Morgan, *The Birth of the Republic: 1763-89*, 129-44 (3d ed. 1992). The Confederation Congress had failed badly in its attempts to administer the new Republic. Neither specially-constituted congressional committees nor congressionally-appointed administrators had been successful in executing the law. *Id.* at 123-28. Article II, Section 2 was drafted to provide effective and practical governance through a strong Executive with predominate authority over all principal officer and judicial appointments, and a sole temporary commissioning authority to always insure a fully staffed government and judiciary.

The Framers gave the Clause 3 appointment option generous functional efficiencies which are dependent on no Senate role and which allow no Senate interference. The temporary appointment lasts until the end of the next session without Senate ratification needed, or Senate revocation allowed, during that period. The Framers did not prohibit

successive recess commissions.[16] Nor did they restrict the function or power of temporary officials.

The Framers did not include specificity to restrict the duration or type of Senate unavailability, or the timing of a vacancy occurrence necessary for the authority to be triggered. Rather, they charged the President with a broad authority to insure that the federal appointment method would always remain *adequate* to keeping a fully staffed government. Alexander Hamilton explained that the unilateral Executive authority was for those "cases to which the general method was inadequate." *The Federalist No. 67*, at 455 (Cooke ed., 1961).

With such functional efficiencies, it is also important to consider limiting principles inherent in Clause 3's operation. Such limitation is first found in the duration of the appointment. A temporary term of up to 24 months, while significant, is less than a several-years' term of a confirmed departmental office, the many-years' term of an independent agency posting, or the life-tenure office and salary of a confirmed Article III judge. Other limitations are found in possible Senate pushback (e.g., strategically

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[16] Presidents have not infrequently made re-recess appointments. *See* 15 *Op. Off. Legal Counsel* 98 (1991) ("It is well-established that the President may make successive recess appointments to the same person.") (quoting Memorandum from William P. Barr, Assistant Attorney General, Office of Legal Counsel, to C. Boyden Gray, Counsel to the President, at 2 (Nov. 28, 1989)).

terminating its current session or withholding of confirmation cooperation). The Congress has many other ways and means of checking the President in the dynamic relationship between the political Branches. *See Zivotofsky v. Clinton*, 132 S. Ct. at 1441 (Breyer, J., dissenting). As a most recent and relevant example of the dynamic relationship, President Obama, in July 2013, agreed to withdraw the pending nominations of two recess-commissioned NLRB members in exchange for Senate obstructionists' pledge to allow simple-majority confirmation votes for replacement nominees.

The wisdom of the Framers' final judgment on temporary appointments was that the Clause's efficiencies and limitations work together to allow what Associate Justice Oliver Wendell Holmes, Jr. described as a requirement for constitutional government: "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Bain Peanut Co. of Texas v. Pension*, 282 U.S. 489, 501 (1931).

II. *Nixon v. United States*: Applying *Baker*'s Classical and Prudential Factors

In *Nixon v. United States*, the Court rejected, as nonjusticiable, a debenched federal judge's challenge to the Senate's questionable exercise of its Article I, Section 3, Clause 6 "sole" duty to "try" all impeachments.

A. No Textual Limit: Refusing to Define "try" (or "the Recess")

The *Nixon* Court refused to review a procedurally problematic Senate impeachment trial process by "evidence committee." Only 12 Senators heard live testimony while 88 Senators avoided jury duty in favor of later having access to a cold record. All 100 Senators then voted – thumbs up or down. Hardly the Framers' vision of the upper legislative chamber transformed into the nation's High Court of Impeachment. Nevertheless, the Court determined that the textual commitment of authority to the Senate was absolute.

The Court refused to play sematic games: "[T]he word 'try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate." *Nixon*, 506 U.S. at 239. Similarly, the terms "the Recess" and "Vacancies that may happen" in the Recess Appointment Clause of Article II, Section 2, do not provide an identifiable textual limit on the exclusive authority which is committed to the President. The Recess Appointment Clause's textual commitment of exclusive authority to the President is of the same non-reviewable quality as that of the Impeachment Trial Clause to the Senate.

This Court should also readily determine that "there is no separate provision of the Constitution that could be defeated" by allowing the President "final authority" to utilize his temporary appointment authority. *Id.* at 237. It is important to underline that

no individual rights claims are, or could be, presented by the Respondent's challenge.[17]

B. Conflicted-Out: Judiciary as Final Arbiter of "Important Constitutional Check" on Judiciary

Respondent's challenge presents a significant conflict-of-interest for the judiciary. Although the instant challenge involves agency appointments rather than judicial, the nonjusticiability standard should be uniform as to all temporary appointments; the Framers chose not to have a distinct appointment process for judges and other officers. The Executive has frequently used the unilateral authority to fill Article III judgeships. More than 300 justices and judges have risen to the federal bench by recess commission, including such notable jurists as Augustus Hand, Earl Warren, William Brennan, Potter Stewart, and Griffin Bell. George Washington used recess commissions to fill judgeships created by the first Judiciary Act. Thomas Jefferson recess appointed ten federal judges and thirty Justices of the Peace – including twenty-five jurists whom John Adams had nominated and the Federalist Senate had earlier confirmed as "midnight" judges.[18] The Republic's first

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[17] It remains an open question whether Judge Nixon's lawyer should have emphasized his individual rights claims (due process or attainder).

[18] The doubly-disappointed William Marbury received neither delivery of his ordinary commission from Adams, nor a

(Continued on following page)

five Presidents recess appointed over thirty federal judges, including five Supreme Court justices.

The *Nixon* opinion prudently acknowledged: "Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counter-intuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers." *Nixon*, 506 U.S. at 235 (citations omitted). The majority cautioned that Judge Walter Nixon's "argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate." *Id.* Similarly, the judiciary should be conflicted-out of being the final arbiter of the uniform process by which judges are strategically and most efficiently benched.

The appointment of new judges serves as an "important constitutional check" on the *status quo* of a given court and the judiciary as a whole.[19] The Executive's use of the authority to bench judges has a

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recess commission from Jefferson. *See* David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 Cath. U. L. Rev. 349, 400 (1996).

[19] Vacancies on an appellate bench obviously increase the *en banc* voting power and panel influence of the incumbent judges. The power of incumbent judges is significantly increased when bench vacancies are prolonged and numerous, such as the D.C. Circuit has experienced for over a decade. Judges should not be final arbiters of the President's most efficient appointment method to "regulate" bench vacancies.

uniquely transformative history.[20] "Presidents have long used the recess appointment power to ease the way for putting well-qualified and distinguished judges from underrepresented groups on the federal bench." Diana Gribbon Motz, *The Constitutionality and Advisability of Recess Appointment of Article III Judges*, 97 Va. L. Rev. 1665, 1680 (2011). William McKinley recess commissioned Jacob Trieber to a trial bench in Arkansas as the nation's first Jewish federal judge. Woodrow Wilson recess appointed Samuel Alschuler as one of the first Jewish federal appellate jurists. Harry Truman utilized a recess commission to place the first African-American on the U.S. Court of Appeals, William Hastie. Four of the first five African-American federal appellate judges secured the bench by recess commission.

Seeking bench transformation during a period of reactionary Senate obstruction by regional factions of his own party, John F. Kennedy recess-appointed over twenty percent of his judges (with each winning subsequent confirmation). President Kennedy recess-commissioned seventeen judges on just one day – October 5, 1961. Thurgood Marshall was named to the Second Circuit on that day, providing the NAACP lawyer with much-needed protection for future harsh Senate confirmation ordeals. The first two women to rise to a federal district court were recess commissioned, including Sarah Hughes to a trial bench in

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[20] *See* Victor Williams, *Estrada: Do a Recess Appointment*, Nat'l L.J. 12 (March 10, 2003).

Dallas, Texas. The only woman to administer the presidential oath of office, Judge Hughes, swore-in Lyndon Johnson at Dallas's Love Field inside Air Force One.[21]

President Johnson recessed appointed African-American judicial legends Spottswood Robinson, III and A. Leon Higginbotham. William Jefferson Clinton placed the first African-American on the Fourth Circuit after being blocked for years from making a permanent appointment. On the eve of the 21st Century, President Clinton recess commissioned Roger Gregory "in the grand tradition of Presidents of both parties, dating all the way back to George Washington, who have used their constitutional authority to bring much needed balance and excellence to our Nation's courts."[22]

III. Dense Political Thicket: Court's Review Beyond Textual Commitment to Executive Requires Judicial Review of Appointment Obstruction – Holds, Filibusters, and House-Senate Scheduling Schemes

The instant adjudication is a continuation of an intense political conflict over Barack Obama's

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[21] *See* Mary L. Clark, *One Man's Token is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 Vill. L. Rev. 487, 514 (2004).

[22] 36 Weekly Comp. of Pres. Doc. 3180 (Dec. 27, 2000), http://www.gpo.gov/fdsys/pkg/WCPD-2001-01-01/html/WCPD-2001-01-01-Pg3180.htm.

appointments and governance. If this Court is to review the President's exercise of recess appointment authority, it should also review the constitutionality of Senate minority confirmation obstruction – including holds and filibusters – that directly caused the emergency need for temporary appointments.

A. Review of Obstruction that Led to Temporary Commissions

Amicus respectfully asserts "Senate inaction" fails to adequately describe how and why Craig Becker's NLRB nomination was withdrawn, and a replacement recess commissioned. *See* Pet. Br. at 2. Forceful, repeated Senate obstructionist action led to the Becker withdrawal. As with many other Barack Obama nominees, Becker, in his multiple nominations, faced months and years of very active confirmation tribulation. Arcane procedural hurdles, extreme slow walking, committee hearing tribulations, hundreds of written interrogatories, floor speech defamations, extortion holds, and silent filibusters are the regular order of Senate confirmation business. At the end of nominee Becker's first confirmation travail, he received 52 favorable votes; a simple-majority constitutionally sufficient for Senate confirmation, but not the super-majority tabulation required for filibuster cloture.

Almost immediately after the President's January 2012 appointments, the political conflict was

moved to federal court fora. Battles began in jurisdictions all across the nation, and congressional obstructionists mounted a frontal attack in the instant action. Forty-two members of the Senate minority and the House Speaker filed *amici* briefs below to formally support the Respondent's challenge. The 42 Senators also participated in oral argument below.

B. No Judicially Manageable Standards and No Respect Due

Once deep in the political thicket, however, the Court will find no manageable standards to define "recess," to resolve the congressional interference with the Executive's appointment obligation, to supervise the internal conflict among congressional factions, nor to measure how much deference is due the Senate when the President signs recess commissions, if any. This Court should not create or adopt a recess standard that would distinguish different types of Senate unavailability and that would attach constitutional weight to those various types of Senate breaks. *Nixon* explained that "the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch." *Nixon*, 506 U.S. at 228.

Judicial inquiry will necessarily focus on the 2011 congressional scheduling scheme to force the

Senate to hold pro forma sessions every three days. A House freshmen faction orchestrated the stratagem with the express motive to "prevent any and all recess appointments by preventing the Senate from recessing for the remainder of the 112th Congress."[23]

It is unlikely that this Court could undertake "independent resolution" of the obstruction and the President's recess commission response "without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217. Outside adjudication, disrespect for the partisan confirmation dysfunction is past due.[24]

C. Third Circuit's *New Vista* and Fourth Circuit's *Enterprise* Create Non-justiciability Conflict with Eleventh Circuit's *Evans*

When rejecting a challenge to President George W. Bush's recess appointment of Judge William Pryor, the *en banc* Eleventh Circuit ruled that the "controversial"

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[23] Victor Williams, *House GOP Can't Block Recess Appointments*, Nat'l L.J. 39 (Aug. 15, 2011) (quoting Representative Jeff Landry, Letter to the Speaker of the House John Boehner, et al. (June 15, 2011).

[24] *See* Hon. John G. Roberts, *Year-End Report on the Federal Judiciary 8* (2010) ("Each political party has found it easy to turn on a dime from decrying to defending the blocking of judicial nominations, depending on their changing political fortunes."); *see* Oskar Garcia, *Kennedy: Judges' Senate Confirmation Too Political*, A.P. The Big Story, Aug. 15, 2012, http://bigstory.ap.org/article/kennedy-judges-senate-confirmation-too-political.

aspect of the "blocked" confirmation "presents a political question." *Evans v. Stephens*, 387 F.3d 1220, 1227 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005). The Eleventh Circuit refused to create a standard to measure "how much Presidential deference is due to the Senate when the President is exercising the discretionary authority that the Constitution gives fully to him." *Id.*

Two prior challenges to recess appointed judges were rejected by lower courts fully *on the merits*. *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985), cert. denied, 475 U.S. 1048 (1986) and *United States v. Allocco*, 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963). Neither case, however, involved appointments with any degree of underlying confirmation conflict as here. And, unlike in *Evans*, neither opinion addressed nonjusticiability.

Recently, the Third Circuit created a direct conflict with the Eleventh Circuit's nonjusticiability determination in *Evans* when deciding another challenge to Barack Obama's NLRB recess appointments. *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203 (3d Cir. 2013). The court considered and rejected various political question arguments lodged by this *amicus*. *Id.* at 215-19. The panel majority ruled that judges – not the President – have final authority to dictate "when" the President may make a recess appointment. *Id.* at 216.

After rejecting Article II, Section 2's textual commitment of the issue to the President, the two-judge panel majority minimized the relevance of this

Court's *Nixon* ruling, dismissed prudential concerns, and proclaimed discovery of "several manageable standards" for resolution.[25] The majority conceded, however, that "there is no likely judicially manageable standard" to be found if the question is framed "as the *amicus* has" to include the underlying congressional obstruction that led to the NLRB commissions. *Id.* at 217-18.

Declaring a question to be narrowly-framed does not make it so. Denying the breadth and context of the political question being asked does not alter the power usurpation of the answer. Nor does such judicial denial limit the answer's disruptive political effects. By revoking the March 2010 recess appointment of Craig Becker, the court fouls every intrasession recess commission ever signed by any President – 329 such appointments made since 1981. The court taints unknown-thousands of official acts and judgments made by those officers and judges as *ultra vires*.

Most recently, in July 2013, the Fourth Circuit added to the circuit split by rejecting a political question determination and adopting the flawed semantics of the D.C. and Third Circuit panels. *NLRB v. Enterprise Leasing Company Southeast, LLC,* 722 F.3d 609 (4th Cir. 2013). Although the Fourth Circuit

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[25] A detailed dissent, which forcefully rebutted the whole of the majority's merits opinion, also explained why the majority's chosen intersession-only recess standard was "unworkable and not judicially manageable."

panel denied this *amicus'* motion for leave to raise nonjusticiability via a lodged brief, the majority nevertheless framed the political-question issue as a hypothetical: "The Board does not suggest that we should decline to address the meaning of the term 'the Recess' because it is a non-justiciable political question. However, if the Board raised such an argument, we would reject it." *Id.* at 660 n.28 (citations omitted).

The Court should be noticed that the Seventh Circuit has a related adjudication pending decision in which this *amicus* was granted leave to raise the alternative political-question theory. The case was heard and taken under advisement on May 31, 2013. Motions to stay the proceeding, based on this Court's grant of *certiorari* in the instant action, were denied on July 15, 2013. *Big Ridge, Inc. v. NLRB*, No. 12-3120 (7th Cir. *decision pending*).

IV. Abstention *A Fortiori*: Alexander Bickel's Prudential Plea

As noted, this *amicus'* political question arguments did not fair well in courts below. Perhaps less "domesticated" abstention advocacy is needed; "something greatly more flexible, something of prudence, not construction and not principle." The purest prudential strain of nonjusticiability incubates in Alexander Bickel's *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962). In unmatched

aesthetic, Bickel offers a theoretical foundation for abstention instead of criteria:

> "In a mature democracy, choices such as this must be made by the executive . . . " Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.

Id. at 184. Worsening partisan obstruction and ideological appointment rancor – resulting in critically important federal offices and benches remaining vacant for years at a time – certainly satisfy Bickel's (a) "strangeness of the issue" and intractable resolution description. Stranger still is the reality that partisans and ideologues reacted to the President's response to their appointment obstruction by lodging scores of lawsuits in various jurisdictions across the nation. Having lost the political appointment fight, the obstructionists sued. The popular media captured well the (b) "sheer momentousness" of the recess appointment response that was needed to resurrect the independent labor agency's authority. And commentators were quick to expose the "unbalance[d]

judicial judgment" of the D.C. Circuit's *Noel Canning*, Third Circuit's *New Vista* and Fourth Circuit's *Enterprise* rulings.

Much more analysis will be needed to understand the broader effects of each panel's majority ruling which, if not (c) "ignored" by all, effectively canceled hundreds of past intra-session recess appointments of both officials and judges, and renders *ultra vires* unknown thousands of their actions and judgments. Perhaps the judges below believed the full effect of their rulings would be, or should be, "ignored."

The Solicitor General has named names. In Appendices A and B of the Petitioner's merits brief, the Court is provided with the names, offices, and appointment dates of hundreds of the officials and judges whose commissions were effectively revoked by courts below. Pet. Br., Appendices A and B. It is not as if the Third, Fourth and D.C. Circuit adjudications were merely ideological thought-exercises developed for a conference break-out session of the Federalist Society or the American Constitution Society. The full legal effects of the rulings below cannot be "ignored" by this Court.

Every official act, signature, decision, opinion, memorandum and judgment of every official or judge – listed in Appendices A and B – is subject to challenge unless such contest is time-barred. In an age of federal fiscal sequestration and budgetary dysfunction, the U.S. Treasury Department's obligation to attempt a claw-back of the salaries and benefits paid

to those listed officials and judges should certainly not be "ignored" if the "judicial judgment" below is to be taken seriously.

The final part (d) of Bickel's prudential foundation fully captures the complex absurdity of "electorally irresponsible" edicts coming from appointed judges who only exponentially worsen the destructive effects of appointment obstruction by our elected officials. Especially as the judiciary has "no earth to draw strength from," it should steadfastly resist being pulled into the political mud-fight of modern appointments.

V. Finality in Appointments

The nation's extreme need for finality in appointment practice weighs heavily in favor of a broad political-question determination.

A. Extreme Need for Finality

When *Nixon* was below, Judge Steven Williams wrote: "Although the primary reason for invoking the political question doctrine in our case is the textual commitment . . . , the need for finality also demands it." *Nixon v. United States*, 938 F.2d 239, 245-46 (D.C. Cir. 1991) (citations omitted). The cost is chaos: "[T]he intrusion of the courts would expose the political life of the country to months, or perhaps years, of chaos." *Id.* at 246. The many challenges to the 2012 NLRB and CFPB commissions have already resulted in both

political and economic disruptions. The intended and unintended consequences of the rulings below promise exponential chaos. As Judge Williams reasoned: "If the political question doctrine has no force where the Constitution has explicitly committed a power to a coordinate branch and where the need for finality is extreme, then it is surely dead." *Id.*

B. *Goldwater v. Carter*'s Expedient Example

Barry Goldwater led a group of nine Senators and sixteen House members in suing President James Earl Carter for his controversial abrogation of a treaty with the Republic of China (Taiwan). A district judge escalated the conflict by ruling that the President needed approval of two-thirds of the Senate, or a congressional majority, to abrogate the Mutual Defense Treaty. Amid increasing political turmoil, the *en banc* D.C. Circuit reversed on the merits. The congressional delegation immediately sought *certiorari* review and the Solicitor General's response raised political question nonjusticiability – albeit in the alternative. Without allowing merits briefing and without scheduling oral argument, the Court issued a one-sentence summary order: "Certiorari granted, judgment vacated, and case remanded with directions to dismiss the complaint." 444 U.S. 996 (1979). The high court process took all of ten days.

In a lead concurrence, then-Associate Justice William Rehnquist explained: "[T]he basic question

presented by the Respondent in this case is 'political' and therefore nonjusticiable." *Id.* at 1002. "Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty." *Id.* at 1003. More so here, "while the Constitution is express as to the manner in which the Senate shall participate" in the confirmation of a permanent appointment, its next clause negates "that body's participation" in the President's signing of a temporary commission.[26] *Goldwater* sets the example for this Court's prudent withdrawal from this ongoing political conflict.

VI. Unconstitutional Confirmation Filibusters: The Framers v. "A Little Group of Willful Men"

Amicus respectfully acknowledges that this Court may well choose to reach the merits of the Respondent's challenge. Perhaps our democracy is too immature to allow the Court's embrace of Alexander Bickel's robust restraint; the past decade of puerile Senate confirmation games and gimmicks certainly do not testify to a "mature democracy." If the Court

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[26] *See* Patrick Hein, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 Calif. L. Rev. 235, 265-69 (2008) (referencing Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1273 (1995)).

allows itself to be drawn into the dense political thicket, *amicus* then alternatively argues that it must fully accept the responsibility to clear a constitutional path back to a fully-functional federal appointments process. If the Court reaches this adjudication's merits, the foundation of modern appointment obstruction – confirmation holds and filibusters – should be directly subject to judicial review and invalidated.

A. Exposing the "Little Group of Willful Men"

"A little group of willful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible." When Woodrow Wilson condemned the Senate filibuster in 1917, he could not have imagined the exponential filibuster shame of our present age. *See* Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track,* 37 (2006). The proliferation of the filibuster as obstructionist weapon is telling: Senate Majority Leader Lyndon Johnson faced one filibuster during his tenure, Majority Leader Bill Frist dealt with over 100 filibusters, and Majority Leader Harry Reid has called over "400 cloture votes on issues and nominations to try to end debate and move to action." Norman Ornstein, *Senate Minority Party Wields the Filibuster as a Weapon of Mass Obstruction*, Nat'l J., July 17, 2013, http://www.nationaljournal.

com/columns/washington-inside-out/senate-minority-party-wields-the-filibuster-as-a-weapon-of-mass-obstruction-20130717.

Recent Senate confirmation reform efforts have failed or fizzled. As they debate the "constitutional option" (a/k/a "nuclear option") for reform, Senators openly acknowledge that the confirmation filibuster/cloture operation is unconstitutional. *See* Jay R. Shampansky, *Constitutionality of a Senate Filibuster of a Judicial Nomination*, Cong. R. Serv., Dec. 6, 2004 (RL32102).

B. Framers' Design for Simple-Majority Confirmation Votes

Seeking to "jettison the supermajority system of the Articles of Confederation," 1787 Philadelphia Convention delegates explicitly rejected general supermajority vote requirements. *Skaggs v. Carle*, 110 F.3d 831, 841-42 (D.C. Cir. 1997) (Edwards, C.J., dissenting). The Framers allowed only five explicit exceptions to Senate simple-majority rule: expelling members, ratifying treaties, overriding presidential vetoes, convicting/disqualifying on impeachments, and proposing constitutional amendments.

James Madison, in *Federalist 58*, explains that a general supermajority vote requirement reverses "the fundamental principle of government . . . It would be no longer the majority that would rule: the power would be transferred to the minority." *The Federalist No. 58*, at 397 (James Madison) (Jacob E. Cooke ed., 1961). And, in *Federalist 22*, Alexander Hamilton

described how a supermajority requirement distorts governance as "the smaller number will overrule that of the greater." *The Federalist No. 22*, at 141 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton further explained a supermajority vote "[in] its real operation," has potential to be used by the few to "embarrass the administration, . . . destroy the energy of government," and hold governance hostage to "the . . . caprice or artifices of an insignificant, turbulent, or corrupt junto." Hamilton was unreserved in his warning:

> In those emergencies of a nation, in which the goodness or badness, the weakness or strength of its government, is of the greatest importance, there is commonly a necessity for action. The public business must, in some way or other, go forward. If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good.

Id. at 140-41. Presciently addressing our age of obstruction and nullification, Hamilton warns of a time when even compromise is blocked by a minority:

> And yet, in such a system, it is even happy when such compromises can take

> place: for upon some occasions things will not admit of accommodation; and then the measures of government must be injuriously suspended, or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savor of weakness, sometimes border upon anarchy.

Id. at 141.

C. Invalidating Supermajority Confirmation Processes

Additional party briefing is perhaps apposite. The Court will independently find, however, a rich popular and academic literature discussing the non-constitutional history of the Senate filibuster and the unconstitutional supermajority operation of the cloture rule. *See, e.g.*, Steven Calabresi, *Pirates We Be*, Wall St. J., A14 (May 14, 2003). The Court's inquiry might best begin with Emmet Bondurant's 2011 article briefing six direct ways in which filibusters are unconstitutional. Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 Harv. J. on Legis. 467 (2011). The Court should extend its examination to review all appointment obstruction games and gimmicks such as confirmation "holds" (anonymous, tag-team, rolling, blanket, and extortion). Whatever its form, the hold is a *de facto* filibuster and necessitates an unconstitutional supermajority cloture vote as a predicate for confirmation.

Professor Edward Corwin, decades ago, discussed perversion of the confirmation process, in a related context:

> May the Senate attach conditions to its approval of appointment, as it frequently does to its approval of a treaty? The entire record of practice under the Constitution negatives the suggestion, as also does that of opinion. Madison, Hamilton, Jefferson, and Story all expressed themselves to the effect that the Senate's role in relation to appointments is only that of rejecting or confirming nominations without condition.

See Edward S. Corwin, *The President: Office and Powers*, 92-93 (1948). Do the extorting conditions of a Senator's confirmation filibuster or hold not also "invade the powers of the office" and "limit the officer's tenure?" *Id.* at 93. In direct condemnation of the filibuster which "extorts special favors for its authors," Professor Corwin lamented the "indefensible concessions which a small block of so-called 'Silver Senators' have been able to wrest." *Id.* at 348. No longer the rarely-invoked prerogative of the few "Silver Senators," the modern silent filibuster is now as common as it is destructive. The frequency of the confirmation filibuster makes real Edward Corwin's concern as to whether the Senate will "retain its intended purpose in the constitutional system." *Id.*

CONCLUSION

For the foregoing reasons, *amicus* urges that the court of appeals be reversed. The Court should *either* determine Respondent's challenge to be nonjusticiable; *or* fully reach all the merits of the appointment adjudication to *both* reaffirm the Executive's recess appointment power and invalidate Senate confirmation holds and filibusters which require unconstitutional supermajority cloture/confirmation votes.

Respectfully submitted,

VICTOR WILLIAMS
Counsel of Record
Faculty Suite 480
COLUMBUS SCHOOL OF LAW
CATHOLIC UNIVERSITY OF AMERICA
Washington, D.C. 20064
(202) 319-5559
williamv@law.edu